

UNITED STATES DEPARTMENT OF THE INTERIOR
WASHINGTON, D.C. 20240

Secretary of the Interior Rogers C. B. Morton

Office of Hearings and Appeals . . . James M. Day, Director

Office of the Solicitor . . . Kent Frizzell, Solicitor

**DECISIONS
OF THE
UNITED STATES
DEPARTMENT OF THE INTERIOR**

Edited by
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Annis K. Olsen



VOLUME 80

JANUARY-DECEMBER 1973

U.S. GOVERNMENT PRINTING OFFICE, WASHINGTON: 1974

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. 20402

PREFACE

This volume of Decisions of the Department of the Interior covers the period from January 1, 1973 to December 31, 1973. It includes the most important administrative decisions and legal opinions that were rendered by officials of the Department during the period.

The Honorable Rogers C. B. Morton served as Secretary of the Interior during the period covered by this volume; Mr. John C. Whitaker, served as Under Secretary; Messrs. Jack O. Horton, John Kyl, Laurence E. Lynn, Jr., Nathaniel Reed, Stephen Wakefield served as Assistant Secretaries of the Interior; Mr. Kent Frizzell served as Solicitor of the Department of the Interior and Mr. Raymond C. Coulter as Deputy Solicitor. Mr. James M. Day, intermittently served as Director, Office of Hearings and Appeals.

This volume will be cited within the Department of the Interior as "80 I.D."

Secretary of the Interior.

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ERRATA

- Page 5—Left Col. par. 4, line 6, correct citation 43 U.S.C. § 2851 to 851.
- Page 6—Signature—Edward W. Stuebing.
- Page 14—Right Col., line 17 from bottom, correct to read, data contained in the reports.
- Page 18—Title of Decision, add period after the initial M.
- Page 21—Signature—Anne Poindexter Lewis.
- Page 50—Right Col, line 5, correct date to October 28, 1964.
- Page 51—Footnote 69, line 6 (Cen-Vi-Ro Correspondence).
- Page 78—Beginning left col. insert *particular defect but not for other*.
- Page 154—Right col., line 2—add to pages 27, 36, 37. *We consider that we have jurisdiction over the claims.*
- Page 212—Par. 3, line 3, correct date to read July 23, 1953.
- Page 215—Delete—317 from Lynn E. Erickson's decision.
- Page 299—Correct Title of Decision to read IVERSEN.
- Page 341—Upper right, add 1 to page 34.
- Page 363—Left col., par. 2, line 6, correct Exhibit, from AA to OO.
- Page 398—Left col., par. 4, line 10, legal citation year from 1969 to 1960.
- Page 428—Right col., par. 3, line 13, correct the word corroborate.
- Page 491—Right col. line 4 from the bottom delete the word at.
- Page 517—Left col., line 22, delete s correct to read Kake.
- Page 539—Left col., par. 1, line 3 legal citation should read 189.
- Page 552—Left col., line 7, correct vol. no. to 79 I.D. 379.
- Page 559—Footnote 1, correct citation to IBCA-757-1-69.
- Page 566—Footnote 13, should read, 79 I.D. 158 (1972).
- Page 598—Right col., line 12, decided delete d.
- Page 606—Left col., par. 1, line 21, correct statute 83 Stat. 742-804.
- Page 697—Odd page should read 667 *Appeal of PHL Contractors, October 23, 1973.*
- Page 702—Add—Opinion by Mr. Fishman.
- Page 707—Right col., par. 1, line 15 delete 3, should read 801 et seq. (1970).
- Page 727—Footnote 2 correct CFR title from 30 to 43.
- Page 746—Left col., par. 3, line 7 correct to read 15,380.
- Page 786—Right col., par. 1, last line add s to italic.
- Page 805—8 pt. par. 5, line 6 correct Act to read May 8, 1906 (34 Stat. 182).
- Page 806—Left col., par. 3 add s to italic.

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Adler Construction Co. v. U.S., Cong. 10-60. Dismissed, 423 F. 2d 1362 (1970); rehearing denied, July 15, 1970; *cert. denied*, 400 U.S. 993 (1970); rehearing denied, 401 U.S. 949 (1971).

Adler Construction Co. v. U.S., Cong. 5-70. Trial Commr's. report accepting & approving the stipulated agreement filed September 11, 1972.

Estate of John J. Akers, 1 IBIA 8; 77 I.D. 268 (1970)

Dolly Custer Akers v. The Dept. of the Interior, Civil No. 907, D. Mont. Judgment for defendant, September 17, 1971; order staying execution of judgment for 30 days issued October 15, 1971; appeal dismissed for lack of prosecution, May 3, 1972.

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Andrew J. Kalerak, Jr., et al. v. Stewart L. Udall, Civil No. A-35-66, D. Alas. Judgment for plaintiff, October 20, 1966; *rev'd.*, 396 F. 2d 746 (9th Cir. 1968); *cert denied*, 393 U.S. 1118 (1969).

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Max Barash, The Texas Co., 63 I.D. 51 (1956)

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Sam Bergesen v. U.S., Civil No. 2044, D. Wash. Complaint dismissed March 11, 1958; no appeal.

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Consolidated Gas Supply Corp. v. Stewart L. Udall, et al., Civil No. 2109-63. Judgment for defendant, September 20, 1965; Per curiam decision, aff'd., April 28, 1966; no petition.

Melvin A. Brown, 69 I.D. 131 (1962)

Melvin A. Brown v. Stewart L. Udall, Civil No. 3352-62. Judgment for defendant, September 17, 1963; rev'd., 335 F. 2d 706 (1964); no petition.

R. C. Buch, 75 I.D. 140 (1968)

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The California Co. v. Stewart L. Udall, Civil No. 980-59. Judgment for defendant, 187 F. Supp. 445 (1960); aff'd., 296 F. 2d 384 (1961).

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Cameron Parish Police Jury v. Stewart L. Udall, et al., Civil No. 14,206, W.D.

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Barney R. Colson, 70 I.D. 409 (1963)

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Southwestern Petroleum Corp. v. Stewart L. Udall, Civil No. 2209-62. Judgment for defendant, October 19, 1962; aff'd., 325 F. 2d 633 (1963); no petition.

Guthrie Electrical Construction, 62 I.D. 280 (1955), IBCA-22 (Supp.) (March 30, 1956)

Guthrie Electrical Construction Co. v. U.S., Ct. Cl. No. 129-58. Stipulation of settlement filed September 11, 1958. Compromised offer accepted and case closed October 10, 1958.

L. H. Hagood, et al., 65 I.D. 405 (1958)

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Raymond J. Hansen, et al., 67 I.D. 362 (1960)

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J. D. Armstrong Co., 63 I.D. 289 (1956)

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Max L. Krueger, Vaughan B. Connelly, 65 I.D. 185 (1958)

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L. B. Samford, Inc., 74 I.D. 86 (1967)

L. B. Samford, Inc. v. U.S., Ct. Cl. No. 393-67. Dismissed, 410 F. 2d 782 (1969); no petition.

Charles Lewellen, 70 I.D. 475 (1963)

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Elgin A. McKenna Executrix, Estate of Patrick A. McKenna, 74 I.D. 133 (1967)

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Mrs. Elgin A. McKenna, Widow and Successor in Interest of Patrick A. McKenna, Deceased v. Walter J. Hickel, Secretary of the Interior, et al., Civil No. 2401, D. Ky. Dismissed with prejudice, May 11, 1970.

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Wade McNeil v. Fred A. Seaton, Civil No. 648-58. Judgment for defendant, June 5, 1959 (opinion); rev'd., 231 F. 2d 931 (1960); no petition.

Wade McNeil v. Albert K. Leonard, et al., Civil No. 2226, D. Mont. Dismissed, 199 F. Supp. 671 (1961); order, April 16, 1962.

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Salvatore Megna, Guardian, Philip T. Garigan, 65 I.D. 33 (1958)

Salvatore Megna, Guardian etc. v. Fred A. Seaton, Civil No. 468-58. Judgment for plaintiff, November 16, 1959; motion for reconsideration denied, December 2, 1959; no appeal.

Philip T. Garigan v. Stewart L. Udall, Civil No. 1577 Tuc., D. Ariz. Preliminary injunction against defendant, July 27, 1966; supplemental dec. rendered September 7, 1966; judgment for plaintiff, May 16, 1967; no appeal.

MevA Corp., 76 I.D. 205 (1969)

MevA Corp. v. U.S., Ct. Cl. No. 492-69. Suit pending.

Duncan Miller, Louise Cuccia, 66 I.D. 388 (1959)

Louise Cuccia and Shell Oil Co. v. Stewart L. Udall, Civil No. 562-60. Judgment for defendant, June 27, 1961; no appeal.

Duncan Miller, 70 I.D. 1 (1963)

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Duncan Miller, Samuel W. McIntosh, 71 I.D. 121 (1964)

Samuel W. McIntosh v. Stewart L. Udall, Civil No. 1522-64. Judgment for defendant, June 29, 1965; no appeal.

Duncan Miller, A-30546 (August 10, 1966), A-30566 (August 11, 1966), and 73 I.D. 211 (1966)

Duncan Miller v. Udall, Civil No. C-167-66, D. Utah. Dismissed with prejudice, April 17, 1967; no appeal.

Bobby Lee Moore, et al., 72 I.D. 505 (1965), *Anquita L. Klunter, et al.*, A-30483 (November 18, 1965)

Gary Carson Lewis, etc., et al. v. General Services Administration, et al., Civil No. 3253 S.D. Cal. Judgment for defendant, April 12, 1965; *aff'd.*, 377 F. 2d 499 (9th Cir. 1967); no petition.

Henry S. Morgan, et al., 65 I.D. 369 (1958)

Henry S. Morgan v. Stewart L. Udall, Civil No. 3248-59. Judgment for defendant, February 20, 1961 (opinion); *aff'd.*, 306 F. 2d 799 (1962); *cert. denied*, 371 U.S. 941 (1962).

Morrison-Knudsen Co., 64 I.D. 185 (1957)

Morrison-Knudsen Co. v. U.S., Ct. Cl. No. 239-61. Remanded to Trial Comm'r., 345 F. 2d 833 (1965); Commr's. report adverse to U.S. issued June 20, 1967; judgment for plaintiff, 397 F. 2d 826 (1968); part remanded to the Board of Contract Appeals; stipulated dismissal on October 6, 1969; judgment for plaintiff, February 17, 1970.

Glenn Munsey, Earnest Scott, & Arnold Scott v. Smitty Baker Coal Co., 1 IBMA 208, 79 I.D. 676 (1972)

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Navajo Tribe of Indians v. State of Utah, 12 IBLA 1, 80 I.D. 441 (1973)

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Richard L. Oelschlaeger, 67 I.D. 237 (1960)

Richard L. Oelschlaeger v. Stewart L. Udall, Civil No. 4181-60. Dismissed, November 15, 1963; case reinstated, February 19, 1964; remanded, April 4, 1967; *rev'd.* & remanded with directions to enter judgment for appellant, 389 F. 2d 974 (1968); *cert. denied*, 392 U.S. 909 (1968).

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Mrs. Louise A. Pease v. Stewart L. Udall, Civil No. 760-63, D. Alas. Withdrawn April 18, 1963.

Superior Oil Co. v. Robert L. Bennett, Civil No. A-17-63, D. Alas. Dismissed, April 23, 1963.

Native Village of Tyonek v. Robert L. Bennett, Civil No. A-15-63, D. Alas. Dismissed, October 11, 1963.

Mrs. Louise A. Pease v. Stewart L. Udall, Civil No. A-20-63, D. Alas. Dismissed, October 29, 1963 (oral opinion); *aff'd.*, 332 F. 2d 62 (9th Cir. 1964); no petition.

George L. Gucker v. Stewart L. Udall, Civil No. A-39-63, D. Alas. Dismissed without prejudice, March 2, 1964; no appeal.

Paul Jarvis, Inc., 64 I.D. 285 (1957)

Paul Jarvis, Inc. v. U.S., Ct. Cl. No. 40-58. Stipulated judgment for plaintiff, December 19, 1958.

Peter Kiewit Sons' Co., 72 I.D. 415 (1965)

Peter Kiewit Sons' Co. v. U.S., Ct. Cl. 129-66. Judgment for plaintiff, May 24, 1968.

Harold Ladd Pierce, 69 I.D. 14 (1962)

Duncan Miller v. Stewart L. Udall, Civil No. 1351-62. Judgment for defendant, August 2, 1962; *aff'd.*, 317 F. 2d 573 (1963); no petition.

Port Blakely Mill Co., 71 I.D. 217 (1964)

Port Blakely Mill Co. v. U.S., Civil No. 6205, W. D. Wash. Dismissed with prejudice, December 7, 1964.

Ray D. Bolander Co., 72 I.D. 449 (1965)

Ray D. Bolander Co. v. U.S., Ct. Cl. 51-66. Judgment for plaintiff, December 13, 1968; subsequent Contract Officer's dec., December 3, 1969; interim dec., December 2, 1969; Order to Stay Proceedings until March 31, 1970; dismissed with prejudice, August 3, 1970.

Estate of Crawford J. Reed (Unallotted Crow No. 6412), 1 IBIA 326; 79 I.D. 621 (1972)

George Reed, Sr. v. Rogers Morton, et al., Civil No. 1105, D. Mont. Dismissed, June 14, 1973; no appeal.

Reliable Coal Corp., 1 IBMA 97; 79 I.D. 139 (1972)

Reliable Coal Corp. v. Rogers C. B. Morton, Secretary of the Interior, et al., No. 72-1417, United States Court of Appeals for the Fourth Circuit. Suit pending.

Richfield Oil Corp., 62 I.D. 269 (1955)

Richfield Oil Corp. v. Fred A. Seaton, Civil No. 3820-55. Dismissed without prejudice, March 6, 1958; no appeal.

Hugh S. Ritter, Thomas M. Bunn, 72 I.D. 111 (1965), Reconsideration

denied by letter decision dated June 23, 1967, by the Under Secretary.

Thomas M. Bunn v. Stewart L. Udall, Civil No. 2615-65. Remanded, June 28, 1966.

Estate of William Cecil Robedeaux, 1 IBIA 106; 78 I.D. 234 (1971), 2 IBIA 33; 80 I.D. 390 (1973)

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Houston Bus Hill v. Rogers C. B. Morton, Civil No. 72-376, W.D. Okla. Judgment for plaintiff, October 29, 1973; amended judgment for plaintiff, November 12, 1973; appeal docketed, December 26, 1973.

Houston Bus Hill & Thurman S. Hurst v. Rogers C. B. Morton, Civil No. 73-528-B, D. Okla. Suit pending.

San Carlos Mineral Strip, 69 I.D. 195 (1962)

James Houston Bowman v. Stewart L. Udall, Civil No. 105-63. Judgment for defendant, 243 F. Supp. 672 (1965); aff'd., sub nom. *S. Jack Houston, et al. v. Stewart L. Udall*, 364 F. 2d 676 (1966); cert. denied, U.S. 878 (1966); supplemented by M-36767, November 1, 1967.

Seal and Co., 68 I.D. 94 (1961)

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Shell Oil Co., A-30575 (October 31, 1966), *Chargeability of Acreage Embraced in Oil & Gas Lease Offers*, 71 I.D. 337 (1964)

Shell Oil Co. v. Udall, Civil No. 216-67. Stipulated dismissal, August 19, 1968.

Sinclair Oil & Gas Co., 75 I.D. 155 (1968)

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Southern Pacific Co., 76 I.D. 1 (1969)

Southern Pacific Co. v. Walter J. Hickel, Secretary of the Interior, Civil No. S-1274, D. Cal. Judgment for defendant, December 2, 1970 (opinion); no appeal.

Southern Pacific Co., Louis G. Wedekind, 1 IBLA 50; 77 I.D. 11 (1970)

George C. Laden, Louis Wedekind, Mrs. Vern Lear, Mrs. Arda Fritz & Helen Laden Wagner, Heirs of George H. Wedekind, Deceased v. Rogers C. B. Morton, et al., Civil No. R-2858, D. Nev. Suit pending.

Southwest Welding and Manufacturing Division, Yuba Consolidated Industries, Inc., 69 I.D. 173 (1962)

Southwest Welding v. U.S., Civil No. 68-1658-CC, C.D. Cal. Judgment for plaintiff, January 14, 1970; appeal dismissed, April 6, 1970.

Southwestern Petroleum Corp., et al., 71 I.D. 206 (1964)

Southwestern Petroleum Corp. v. Stewart L. Udall, Civil No. 5773, D. N.M. Judgment for defendant, March 8, 1965; *aff'd.*, 361 F. 2d 650 (10th Cir. 1966); no petition.

Standard Oil Co. of California, et al., 76 I.D. 271 (1969)

Standard Oil Co. of California v. Walter J. Hickel, et al., Civil No. A-159-69, D. Alas. Judgment for plaintiff, 317 F. Supp. 1192 (1970); *aff'd.*, sub nom. *Standard Oil Co. of California v. Rogers C. B. Morton, et al.*, 450 F. 2d 493 (9th Cir. 1971); no petition.

Standard Oil Co. of Texas, 71 I.D. 257 (1964)

California Oil Co. v. Secretary of the Interior, Civil No. 5729, D. N.M. Judgment for plaintiff, January 21, 1965; no appeal.

James K. Tallman, 68 I.D. 256 (1961)

James K. Tallman, et al. v. Stewart L. Udall, Civil No. 1852-62. Judgment for defendant, November 1, 1962 (opinion); *rev'd.*, 324 F. 2d 411 (1963); *cert. granted*, 376 U.S. 961 (1964); Dist. Ct. *aff'd.*, 380 U.S. 1 (1965); rehearing denied, 380 U.S. 989 (1965).

Texaco, Inc., 75 I.D. 8 (1968)

Texaco, Inc., a Corp. v. Secretary of the Interior, Civil No. 446-68. Judgment for plaintiff, 295 F. Supp. 1297 (1969); *aff'd.* in part & remanded, 437 F. 2d 636 (1970); *aff'd.* in part & remanded, July 19, 1972.

Texas Construction Co., 64 I.D. 97 (1957) Reconsideration denied, IBCA-73 (June 18, 1957)

Texas Construction Co. v. U.S., Ct. Cl. No. 224-58. Stipulated judgment for plaintiff, December 14, 1961.

Estate of John Thomas, Deceased Cayuse Allottee No. 223 and Estate of Joseph Thomas, Deceased, Umatilla Allottee No. 877, 64 I.D. 401 (1957)

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Thor-Westcliffe Development, Inc., 70 I.D. 134 (1963)

Thor-Westcliffe Development, Inc. v. Stewart L. Udall, Civil No. 5343, D. N. M., Dismissed with prejudice, June 25, 1963.

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Thor-Westcliffe Development, Inc. v. Stewart L. Udall, et al., Civil No. 2406-61. Judgment for defendant, March 22, 1962; *aff'd.*, 314 F. 2d 257 (1963); *cert. denied*, 373 U.S. 951 (1963).

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July 17, 1962 (oral opinion); *aff'd.*, 350 F. 2d 748 (1965); *cert. denied*, 383 U.S. 912 (1966).

Atwood, et al. v. Stewart L. Udall, Civil Nos. 293-62—299-62, incl. Judgment for defendant, August 2, 1962; *aff'd.*, 350 F. 2d 748 (1965); no petition.

Union Oil Co. Bid on Tract 228, Brazos Area, Texas Offshore Sale, 75 I.D. 147 (1968), 76 I.D. 69 (1969).

The Superior Oil Co., et al. v. Stewart L. Udall, Civil No. 1521-68. Judgment for plaintiff, July 29, 1968, modified, July 31, 1968; *aff'd.*, 409 F. 2d 1115 (1969); dismissed as moot, June 4, 1969; no petition.

Union Oil Co. of California, Ramon P. Colvert, 65 I.D. 245 (1958)

Union Oil Co. of California v. Stewart L. Udall, Civil No. 3042-58. Judgment for defendant, May 2, 1960 (opinion); *aff'd.*, 289 F. 2d 790 (1961); no petition.

Union Oil Company of California, et al., 71 I.D. 169 (1964), 72 I.D. 313 (1965)

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Equity Oil Co. v. Stewart L. Udall, Civil No. 9462, D. Colo. Order to Close Files and Stay Proceedings, March 25, 1967.

Gabbs Exploration Co. v. Stewart L. Udall, Civil No. 9464, D. Colo. Order to Close Files and Stay Proceedings, March 25, 1967.

Harlan H. Hugg, et al. v. Stewart L. Udall, Civil No. 9252, D. Colo. Order to Close Files and Stay Proceedings, March 25, 1967.

Barnette T. Napier, et al. v. Secretary of the Interior, Civil No. 8691, D. Colo. Judgment for plaintiff, 261 F. Supp. 954 (1966); *aff'd.*, 406 F. 2d 759 (10th Cir. 1969); *cert. granted*, 396 U.S. 817 (1969); *rev'd. & remanded*, 400 U.S. 48 (1970); remanded to Dist. Ct., March 12, 1971.

John W. Savage v. Stewart L. Udall, Civil No. 9458, D. Colo. Order to Close Files and Stay Proceedings, March 25, 1967.

The Oil Shale Corp., et al. v. Secretary of the Interior, Civil No. 8680, D. Colo. Judgment for plaintiff, 261 F. Supp. 954 (1966); *aff'd.*, 406 F. 2d 759 (10th Cir. 1969); *cert. granted*, 396 U.S. 817 (1969); *rev'd. & remanded*, 400 U.S. 48 (1970); remanded to Dist. Ct., March 12, 1971.

The Oil Shale Corp., et al. v. Stewart L. Udall, Civil No. 9465, D. Colo. Order to Close Files & Stay Proceedings, March 25, 1967.

Joseph B. Umpleby, et al. v. Stewart L. Udall, Civil No. 8685, D. Colo. Judgment for plaintiff, 261 F. Supp. 954 (1966); *aff'd.*, 406 F. 2d 759 (10th Cir. 1969); *cert. granted*, 396 U.S. 817 (1969); *rev'd. & remanded*, 400 U.S. 48 (1970); remanded to Dist. Ct., March 12, 1971.

Union Oil Co. of California, a Corp. v. Stewart L. Udall, Civil No. 9461, D. Colo. Order to Close Files & Stay Proceedings, March 25, 1967.

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Union Pacific R.R., 72 I.D. 76 (1965)

The State of Wyoming and Gulf Oil Corp. v. Stewart L. Udall, etc., Civil No. 4913, D. Wyo. Dismissed with prejudice, 255 F. Supp. 481 (1966); *aff'd.*, 379 F. 2d 635 (10th Cir. 1967); *cert. denied*, 389 U.S. 985 (1967).

U.S. v. Alonzo A. Adams, et al., 64 I.D. 221 (1957), A-27364 (July 1, 1957)

Alonzo A. Adams, et al. v. Paul B. Witmer, et al., Civil No. 1222-57-Y, S.D. Cal. Complaint dismissed, November 27, 1957 (opinion); *rev'd. & remanded*, 271 F. 2d 29 (9th Cir. 1958); on rehearing, appeal dismissed as to Witmer; petition for rehearing by Berriman denied, 271 F. 2d 37 (9th Cir. 1959).

U.S. v. Alonzo Adams, Civil No. 187-60-WM, S.D. Cal. Judgment for plaintiff, January 29, 1962 (opinion); judgment modified, 318 F. 2d 861 (9th Cir. 1963); no petition.

U.S. v. E. A. Barrows and Esther Barrows, 76 I.D. 299 (1969)

Esther Barrows, as an Individual and as Executrix of the Last Will of E.A. Barrows, deceased v. Walter J. Hickel, Civil No. 70-215-CC, C.D. Cal. Judgment for defendant, April 20, 1970; *aff'd.*, 447 F. 2d 80 (9th Cir. 1971).

U.S. v. Lloyd W. Booth, 76 I.D. 73 (1969)

Lloyd W. Booth v. Walter J. Hickel, Civil No. 42-69, D. Alas. Judgment for defendant, June 30, 1970; no appeal.

U.S. v. Alice A. & Carrie H. Boyle, 76 I.D. 61, 318 (1969), Reconsideration denied, January 22, 1970.

Alice A. & Carrie H. Boyle v. Rogers C. B. Morton, Secretary of the Interior, Civil No. Civ-71-491 Phx WEC, D. Ariz. Judgment for plaintiff, May 4, 1972; appeal docketed June 5, 1972.

U.S. v. R. W. Brubaker, et al., A-30636 (July 24, 1968), 9 IBLA 281; 80 I.D. 261 (1973)

R. W. Brubaker a/k/a Ronald W. Brubaker, B. A. Brubaker a/k/a Barbara A. Brubaker & William J. Mann a/k/a W. J. Mann v. Rogers C. B. Morton, Civil No. 73-1228 EC, D. Cal. Dismissed with prejudice, August 13, 1973; appeal docketed, September 13, 1973.

U.S. v. Ford M. Converse, 72 I.D. 141 (1965)

Ford M. Converse v. Stewart Udall, Civil No. 65-581, D. Ore. Judgment for defendant; 262 F. Supp. 583 (1966); *aff'd.*, 399 F. 2d 616 (9th Cir. 1968); *cert. denied*, 393 U.S. 1025 (1969).

U.S. v. Alvis F. Denison, et al., 71 I.D. 144 (1964), 76 I.D. 233 (1969)

Marie W. Denison, Individually & as Executrix of the Estate of Alvis F. Denison, deceased v. Stewart L. Udall, Civil No. 963, D. Ariz. Remanded, 248 F. Supp. 942 (1965).

Leo E. Shoup v. Stewart L. Udall, Civil No. 5822-Phx., D. Ariz. Judgment for defendant, January 31, 1972.

Reid Smith v. Stewart L. Udall, etc., Civil No. 1053, D. Ariz. Judgment for defendant, January 31, 1972; *aff'd*, February 1, 1974.

U.S. v. Everett Foster, et al., 65 I.D. 1 (1958)

Everett Foster, et al. v. Fred A. Seaton, Civil No. 344-58. Judgment for defendants, December 5, 1958 (opinion); *aff'd*, 271 F. 2d 836 (1959); no petition.

U.S. v. Henault Mining Co., 73 I.D. 184 (1966)

Henault Mining Co. v. Harold Tysk, et al., Civil No. 634, D. Mont. Judgment for plaintiff, 271 F. Supp. 474 (1967); *rev'd. & remanded* for further proceedings, 419 F. 2d 766 (9th Cir. 1969); *cert. denied*, 398 U.S. 950 (1970); judgment for defendant, October 6, 1970.

U.S. v. Charles H. Henrikson, et al., 70 I.D. 212 (1963)

Charles H. Henrikson, et al. v. Stewart L. Udall, et al., Civil No. 41749, N.D. Cal. Judgment for defendant, 229 F. Supp. 510 (1964); *aff'd*, 350 F. 2d 949 (9th Cir. 1965); *cert. denied*, 384 U.S. 940 (1960).

U.S. v. Humboldt Placer Mining Co. & Del De Rosier, 8 IBLA 407; 79 I.D. 709 (1972)

Humboldt Placer Mining Co. & Del De Rosier v. Secretary of the Interior, Civil No. S-2755, D. Cal. Suit pending.

U.S. v. Ideal Cement Co., 5 IBLA 235 (1972)

Ideal Basic Industries, Inc., formerly known as Ideal Cement Co. v. Rogers C. B. Morton, Civil No. J-12-72, D. Alas. Suit pending.

U.S. v. Independent Quick Silver Co., 72 I.D. 367 (1965)

Independent Quick Silver Co., an Oregon Corp. v. Stewart L. Udall, Civil No. 65-590, D. Ore. Judgment for defendant, 262 F. Supp. 583 (1966); appeal dismissed.

U.S. v. Richard Dean Lance, 73 I.D. 218 (1966)

Richard Dean Lance v. Stewart L. Udall, et al., Civil No. 1864, D. Nev. Judgment for defendant, January 23, 1968; no appeal.

U.S. v. Charles Maher, et al., 5 IBLA 209; 79 I.D. 109 (1972)

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- Fisher *v.* Heirs of Rule (42 L.D. 62, 64); vacated, 43 L.D. 217.
- Fitch *v.* Sioux City and Pacific R.R. Co. (216 L. and R. 184); overruled, 17 L.D. 43.
- Fleming *v.* Bowe (13 L.D. 78); overruled, 23 L.D. 175.
- Florida Mesa Ditch Co. (14 L.D. 265); overruled, 27 L.D. 421.
- Florida Railway and Navigation Co. *v.* Miller (3 L.D. 324); modified, 6 L.D. 716; overruled, 9 L.D. 237.
- Florida, State of (17 L.D. 355); reversed, 19 L.D. 76.
- Florida, State of (47 L.D. 92, 93); overruled so far as in conflict, 51 L.D. 291.
- Forgeot, Margaret (7 L.D. 280); overruled, 10 L.D. 629.
- Fort Boise Hay Reservation (6 L.D. 16); overruled, 27 L.D. 505.
- Franco-Western Oil Company *et al.* (Supp.), 65 I.D. 427, is adhered to, 66 I.D. 362.
- Freeman, Flossie (40 L.D. 106); overruled, 41 L.D. 63.
- Freeman *v.* Summers, 52 L.D. 201 (1927), is overruled; United States *v.* Winegar, Frank W. *et al.*, 16 IBLA 112 (June 28, 1974), 81 I.D. 370.
- Freeman *v.* Texas and Pacific Ry. Co. (2 L.D. 550); overruled, 7 L.D. 18.
- Fry, Silas A. (45 L.D. 20); modified, 51 L.D. 581.
- Fults, Bill, 61 I.D. 437 (1954); overruled, 69 I.D. 181.
- Galliher, Maria (8 C.L.O. 137); overruled, 1 L.D. 57.
- Gallup *v.* Northern Pacific Ry. Co. (unpublished); overruled so far as in conflict, 47 L.D. 304.
- Gariss *v.* Borin (21 L.D. 542) (See 39 L.D. 162, 225).
- Garrett, Joshua (7 C.L.O. 55); overruled, 5 L.D. 158.
- Garvey *v.* Tuiska (41 L.D. 510); modified, 43 L.D. 229.
- Gates *v.* California and Oregon R.R. Co. (5 C.L.O. 150); overruled, 1 L.D. 336.
- Gauger, Henry (10 L.D. 221); overruled, 24 L.D. 81.
- Glassford, A. W. *et al.* 56 I.D. 88 (1937); overruled to extent inconsistent, 70 I.D. 159.
- Gleason *v.* Pent (14 L.D. 375; 15 L.D. 286); vacated, 53 I.D. 447; overruled so far as in conflict, 59 I.D. 416, 422.
- Gohrman *v.* Ford (8 C.L.O. 6); overruled so far as in conflict, 4 L.D. 580.
- Golden Chief "A" Placer Claim (35 L.D. 557); modified, 37 L.D. 250.
- Goldstein *v.* Juneau Townsite (23 L.D. 417); vacated, 31 L.D. 88.

- Goodale v. Olney* (12 L.D. 324); distinguished, 55 I.D. 580.
Gotebo Townsite v. Jones (35 L.D. 18); modified, 37 L.D. 560.
Gowdy v. Connell (27 L.D. 56); vacated, 28 L.D. 240.
Gowdy v. Gilbert (19 L.D. 17); overruled, 26 L.D. 453.
Gowdy et al. v. Kismet Gold Mining Co. (22 L.D. 624); modified, 24 L.D. 191.
Grampian Lode (1 L.D. 544); overruled, 25 L.D. 495.
Gregg et al. v. State of Colorado (15 L.D. 151); modified, 30 L.D. 310.
Grinnel v. Southern Pacific R.R. Co. (22 L.D. 438); vacated, 23 L.D. 489.
 **Ground Hog Lode v. Parole and Morning Star Lodes* (8 L.D. 430); overruled, 34 L.D. 568 (See *R. R. Rousseau*, 47 L.D. 590).
Guidney, Alcide (8 C.L.O. 157); overruled, 40 L.D. 399.
Gulf and Ship Island R.R. Co. (16 L.D. 236); modified, 19 L.D. 534.
Gustafson, Olof (45 L.D. 456); modified, 46 L.D. 442.
Gwyn, James R. (A-26806) December 17, 1953, unreported; distinguished, 66 I.D. 275.

Hagood, L. N., et al., 65 I.D. 405 (1958); overruled, *Beard Oil Company*, 1 IBLA 42, 77 I.D. 166 (1970).
Halvorson, Halvor K. (39 L.D. 456); overruled, 41 L.D. 505.
Hansbrough, Henry C. (5 L.D. 155); overruled, 29 L.D. 59.
Hardee, D. C. (7 L.D. 1); overruled so far as in conflict, 29 L.D. 698.
Hardee v. United States (8 L.D. 391; 16 L.D. 499); overruled so far as in conflict, 29 L.D. 698.
Hardin, James A. (10 L.D. 313); revoked, 14 L.D. 233.
Harris, James G. (28 L.D. 90); overruled, 39 L.D. 93.
Harrison, Luther (4 L.D. 179); overruled, 17 L.D. 216.
Harrison, W. R. (19 L.D. 299); overruled, 33 L.D. 539.
Hart v. Cox (42 L.D. 592); vacated, 260 U.S. 427 (See 49 L.D. 413).

Hastings and Dakota Ry. Co. v. Christenson et al. (22 L.D. 257); overruled, 28 L.D. 572.
Hausman, Peter A. C. (37 L.D. 352); modified, 48 L.D. 629.
Hayden v. Jamison (24 L.D. 403); vacated, 26 L.D. 373.
Haynes v. Smith (50 L.D. 208); overruled so far as in conflict, 54 I.D. 150.
Heilman v. Syverson (15 L.D. 184); overruled, 23 L.D. 119.
Heinzman et al. v. Letroadec's Heirs et al. (28 L.D. 497); overruled, 38 L.D. 253.
Heirs of Davis (40 L.D. 573); overruled, 46 L.D. 110.
Heirs of Mulnix, Philip (33 L.D. 331); overruled, 43 L.D. 532.
 **Heirs of Stevenson v. Cunningham* (32 L.D. 650); overruled so far as in conflict, 41 L.D. 119 (See 43 L.D. 196).
Heirs of Talkington v. Hempfling (2 L.D. 46); overruled, 14 L.D. 200.
Heirs of Vradenberg et al. v. Orr et al. (25 L.D. 232); overruled, 38 L.D. 253.
Helmer, Inkerman (34 L.D. 341); modified, 42 L.D. 472.
Helphrey v. Coil (49 L.D. 624); overruled, *Dennis v. Jean* (A-20899), July 24, 1937, unreported.
Henderson, John W. (40 L.D. 518); vacated, 43 L.D. 106 (See 44 L.D. 112 and 49 L.D. 484).
Hennig, Nellie J. (38 L.D. 443, 445); recalled and vacated, 39 L.D. 211.
Hensel, Ohmer V. (45 L.D. 557); distinguished, 66 I.D. 275.
Herman v. Chase et al. (37 L.D. 590); overruled, 43 L.D. 246.
Herrick, Wallace H. (24 L.D. 23); overruled, 25 L.D. 113.
Hess, Hoy, Assignee (46 L.D. 421); overruled, 51 L.D. 287.
Hickey, M.A. et al. (3 L.D. 83); modified, 5 L.D. 256.
Hildreth, Henry (45 L.D. 464); vacated, 46 L.D. 17.
Hindman, Ada I. (42 L.D. 327); vacated in part, 43 L.D. 191.
Hoglund, Svan (42 L.D. 405); vacated, 43 L.D. 538.
Holbeck, Halvor F., A-30376 (December 2, 1965); overruled, 79 I.D. 416 (1972).

- Holden, Thomas A. (16 L.D. 493); overruled, 29 L.D. 166.
- Holland, G. W. (6 L.D. 20); overruled, 6 L.D. 639; 12 L.D. 436.
- Holland, William C. (M-27696); decided April 26, 1934; overruled in part, 55 I.D. 221.
- Hollensteiner, Walter (38 L.D. 319); overruled, 47 L.D. 260.
- Holman v. Central Montana Mines Co. (34 L.D. 568); overruled so far as in conflict, 47 L.D. 590.
- Hon v. Martinas (41 L.D. 119); modified, 43 L.D. 197.
- Hooper, Henry (6 L.D. 624); modified, 19 L.D. 86, 284.
- Howard v. Northern Pacific R.R. Co. (23 L.D. 6); overruled, 28 L.D. 126.
- Howard, Thomas (3 L.D. 409) (See 39 L.D. 162, 225).
- Howell, John H. (24 L.D. 35); overruled, 28 L.D. 204.
- Howell L.C., (39 L.D. 92) (See 39 L.D. 411).
- Hoy, Assignee of Hess (46 L.D. 421); overruled, 51 L.D. 287.
- *Hughes v. Greathead (43 L.D. 497); overruled, 49 L.D. 413 (See 260 U.S. 427).
- Hull *et al.* v. Ingle (24 L.D. 214); overruled, 30 L.D. 258.
- Huls, Clara (9 L.D. 401); modified, 21 L.D. 377.
- Humble Oil & Refining Co. (64 L.D. 5); distinguished, 65 I.D. 316.
- Hunter, Charles H. (60 I.D. 395); distinguished, 63 I.D. 65.
- Hurley, Bertha C. (TA-66 (Ir.)), March 21, 1952, unreported; overruled, 62 I.D. 12.
- Hyde, F. A. (27 L.D. 472); vacated, 28 L.D. 284.
- Hyde, F. A. *et al.* (40 L.D. 284); overruled, 43 L.D. 381.
- *Hyde *et al.* v. Warren *et al.* (14 L.D. 576; 15 L.D. 415) (See 19 L.D. 64).
- *Ingram, John D. (37 L.D. 475) (See 43 L.D. 544).
- Inman v. Northern Pacific R.R. Co. (24 L.D. 318); overruled, 28 L.D. 95.
- *Instructions (32 L.D. 604); overruled so far as in conflict, 50 L.D. 628; 53 I.D. 365; Lillian M. Peterson *et al.* (A-20411), August 5, 1937, unreported (See 59 I.D. 282, 286).
- Instructions (51 L.D. 51); overruled so far as in conflict, 54 I.D. 36.
- Interstate Oil Corp. and Frank O. Chittenden (50 L.D. 262); overruled so far as in conflict, 53 I.D. 228.
- Iowa Railroad Land Co. (23 L.D. 79; 24 L.D. 125); vacated, 29 L.D. 79.
- Jacks v. Belard *et al.* (29 L.D. 369); vacated, 30 L.D. 345.
- Jackson Oil Co. v. Southern Pacific Ry. Co. (40 L.D. 528); overruled, 42 L.D. 317.
- Johnson v. South Dakota (17 L.D. 411); overruled so far as in conflict, 41 L.D. 22.
- Jones, James A. (3 L.D. 176); overruled, 8 L.D. 448.
- Jones v. Kennett (6 L.D. 688); overruled, 14 L.D. 429.
- Kackmann, Peter (1 L.D. 86); overruled, 16 L.D. 464.
- Kanawha Oil and Gas Co., Assignee (50 L.D. 639); overruled so far as in conflict, 54 I.D. 371.
- Keating Gold Mining Company, Montana Power Company, Transferee, 52 L.D. 671 (1929), overruled in part. Arizona Public Service Company, 5 IBLA 137, 79 I.D. 67 (1972).
- Kemp, Frank A. (47 L.D. 560); overruled so far as in conflict, 60 I.D. 417, 419.
- Kemper v. St. Paul and Pacific R.R. Co. (2 C.L.L. 805); overruled, 18 L.D. 101.
- Kilner, Harold E. *et al.* (A-21845); February 1, 1939, unreported; overruled so far as in conflict, 59 I.D. 258, 260.
- King v. Eastern Oregon Land Co. (23 L.D. 579); modified, 30 L.D. 19.
- Kinney, E. C. (44 L.D. 580); overruled so far as in conflict, 53 I.D. 228.
- Kinsinger v. Peck (11 L.D. 202) (See 39 L.D. 162, 225).
- Kiser v. Keech (7 L.D. 25); overruled, 23 L.D. 119.
- Knight, Albert B. *et al.* (30 L.D. 227); overruled, 31 L.D. 64.
- Knight v. Heirs of Knight (39 L.D. 362, 491; 40 L.D. 461; overruled, 43 L.D. 242.
- Kniskern v. Hastings and Dakota R.R. Co. (6 C.L.O. 50); overruled, 1 L.D. 362.
- Kolberg, Peter F. (37 L.D. 453); overruled, 43 L.D. 181.
- Krighaum, James T. (12 L.D. 617); overruled, 26 L.D. 448.

- *Krushnic, Emil L. (52 L.D. 282, 295); vacated, 53 I.D. 42, 45 (See 280 U.S. 306).
- Lackawanna Placer Claim (36 L.D. 36); overruled, 37 L.D. 715.
- La Follette, Harvey M. (26 L.D. 453); overruled so far as in conflict, 59 I.D. 416, 422.
- Lamb *v.* Ullery (10 L.D. 528); overruled, 32 L.D. 331.
- Largent, Edward B. *et al.* (13 L.D. 397); overruled so far as in conflict, 42 L.D. 321.
- Larson, Syvert (40 L.D. 69); overruled, 43 L.D. 242.
- Lasselle *v.* Missouri, Kansas and Texas Ry. Co. (3 C.L.O. 10); overruled, 14 L.D. 278.
- Las Vegas Grant (13 L.D. 646; 15 L.D. 58); revoked, 27 L.D. 683.
- Laughlin, Allen (31 L.D. 256); overruled, 41 L.D. 361.
- Laughlin *v.* Martin (18 L.D. 112); modified, 21 L.D. 40.
- Law *v.* State of Utah (29 L.D. 623); overruled, 47 L.D. 359.
- Layne and Bowler Export Corp., IBCA-245 (Jan. 18, 1961), 68 I.D. 33, overruled in so far as it conflicts with Schweigert, Inc. *v.* United States, Court of Claims No. 26-66 (Dec. 15, 1967), and Galland-Henning Manufacturing Company, IBCA-534-12-65 (Mar. 29, 1968).
- Lemmons, Lawson H. (19 L.D. 37); overruled, 26 L.D. 398.
- Leonard, Sarah (1 L.D. 41); overruled, 16 L.D. 464.
- Lindberg, Anna C. (3 L.D. 95); modified, 4 L.D. 299.
- Lindermann *v.* Wait (6 L.D. 689); overruled, 13 L.D. 459.
- *Linhart *v.* Santa Fe Pacific R.R. Co. (36 L.D. 41); overruled, 41 L.D. 284 (See 43 L.D. 536).
- Liss, Merwin E., Cumberland & Allegheny Gas Company, 67 I.D. 385 (1960), is overruled, 80 I.D. 395 (1973).
- Little Pet Lode (4 L.D. 17); overruled, 25 L.D. 550.
- Lock Lode (6 L.D. 105); overruled so far as in conflict, 26 L.D. 123.
- Lockwood, Francis A. (20 L.D. 361); modified, 21 L.D. 200.
- Lonnergrán *v.* Shockley (33 L.D. 238); overruled so far as in conflict, 34 L.D. 314; 36 L.D. 199.
- Louisiana, State of (8 L.D. 126); modified, 9 L.D. 157.
- Louisiana, State of (24 L.D. 231); vacated, 26 L.D. 5.
- Louisiana, State of (47 L.D. 366); overruled so far as in conflict, 51 L.D. 291.
- Louisiana, State of (48 L.D. 201); overruled so far as in conflict, 51 L.D. 291.
- Lucy B. Hussey Lode (5 L.D. 93); overruled, 25 L.D. 495.
- Luse, Jeanette L. *et al.* (61 I.D. 103); distinguished by Richfield Oil Corp., 71 I.D. 243.
- Luton, James W. (34 L.D. 468); overruled so far as in conflict, 35 L.D. 102.
- Lyman, Mary O. (24 L.D. 493); overruled so far as in conflict, 43 L.D. 221.
- Lynch, Patrick (7 L.D. 33); overruled so far as in conflict, 13 L.D. 713.
- Madigan, Thomas (8 L.D. 188); overruled, 27 L.D. 448.
- Maginnis, Charles P. (31 L.D. 222); overruled, 35 L.D. 399.
- Maginnis, John S. (32 L.D. 14); modified (42 L.D. 472).
- Maher, John M. (34 L.D. 342); modified, 42 L.D. 472.
- Mahoney, Timothy (41 L.D. 129); overruled, 42 L.D. 313.
- Makela, Charles (46 L.D. 509); extended, 49 L.D. 244.
- Makemson *v.* Snider's Heirs (22 L.D. 511); overruled, 32 L.D. 650.
- Malone Land and Water Co. (41 L.D. 138); overruled in part, 43 L.D. 110.
- Maney, John J. (35 L.D. 250); modified, 48 L.D. 153.
- Maple, Frank (37 L.D. 107); overruled, 43 L.D. 181.
- Martin *v.* Patrick (41 L.D. 284); overruled, 43 L.D. 536.
- Mason *v.* Cromwell (24 L.D. 248); vacated, 26 L.D. 369.
- Masten, E. C. (22 L.D. 337); overruled, 25 L.D. 111.
- Mather *et al. v.* Hackley's Heirs (15 L.D. 487); vacated, 19 L.D. 48.
- Maughan, George W. (1 L.D. 25); overruled, 7 L.D. 94.

- Maxwell and Sangre de Cristo Land Grants (46 L.D. 301); modified, 48 L.D. 88.
- McBride *v.* Secretary of the Interior (8 C.L.O. 10); modified, 52 L.D. 33.
- McCalla *v.* Acker (29 L.D. 203); vacated, 30 L.D. 277.
- McCord, W. E. (23 L.D. 137); overruled to extent of any possible inconsistency, 56 I.D. 73.
- McCornick, William S. (41 L.D. 661, 666); vacated, 43 L.D. 429.
- *McCraney *v.* Heirs of Hayes (33 L.D. 21); overruled so far as in conflict, 41 L.D. 119 (See 43 L.D. 196).
- McDonald, Roy (34 L.D. 21); overruled, 37 L.D. 285.
- *McDonogh School Fund (11 L.D. 378); overruled, 30 L.D. 616 (See 35 L.D. 399).
- McFadden *et al.* *v.* Mountain View Mining and Milling Co. (26 L.D. 530); vacated, 27 L.D. 358.
- McGee, Edward D. (17 L.D. 285); overruled, 29 L.D. 166.
- McGrann, Owen (5 L.D. 10); overruled, 24 L.D. 502.
- McGregor, Carl (37 L.D. 693); overruled, 38 L.D. 148.
- McHarry *v.* Stewart (9 L.D. 344); criticized and distinguished, 56 I.D. 340.
- McKernan *v.* Bailey (16 L.D. 368); overruled, 17 L.D. 494.
- *McKittrick Oil Co. *v.* Southern Pacific R.R. Co. (37 L.D. 243); overruled so far as in conflict, 40 L.D. 528 (See 42 L.D. 317).
- McMiken, Herbert *et al.* (10 L.D. 97; 11 L.D. 96); distinguished, 58 I.D. 257, 260.
- McNamara *et al.* *v.* State of California (17 L.D. 296); overruled, 22 L.D. 666.
- McPeck *v.* Sullivan *et al.* (25 L.D. 281); overruled, 36 L.D. 26.
- *Mee *v.* Hughart *et al.* (23 L.D. 455); vacated, 28 L.D. 209. In effect reinstated, 44 L.D. 414, 487, 46 L.D. 434; 48 L.D. 195, 346, 348; 49 L.D. 660.
- *Meeboer *v.* Heirs of Schut (35 L.D. 335); overruled so far as in conflict, 41 L.D. 119 (See 43 L.D. 196).
- Mercer *v.* Buford Townsite (35 L.D. 119); overruled, 35 L.D. 649.
- Meyer *v.* Brown (15 L.D. 307) (See 39 L.D. 162, 225).
- Meyer, Peter (6 L.D. 639); modified, 12 L.D. 436.
- Midland Oilfields Co. (50 L.D. 620); overruled so far as in conflict, 54 I.D. 371.
- Mikesell, Henry D., A-24112 (Mar. 11, 1946); *rehearing denied* (June 20, 1946), overruled to extent inconsistent, 70 I.D. 149.
- Miller, D. (60 I.D. 161); overruled in part, 62 I.D. 210.
- Miller, Duncan, A-29760 (Sept. 18, 1963), overruled, 79 I.D. 416 (1972).
- Miller, Duncan, A-30742 (December 2, 1966), overruled, 79 I.D. 416 (1972).
- Miller, Duncan, A-30722 (April 14, 1967), overruled, 79 I.D. 416 (1972).
- Miller, Edwin J. (35 L.D. 411); overruled, 43 L.D. 181.
- Miller *v.* Sebastian (19 L.D. 288); overruled, 26 L.D. 448.
- Milner and North Side R.R. Co. (36 L.D. 488); overruled, 40 L.D. 187.
- Milton *et al.* *v.* Lamb (22 L.D. 339); overruled, 25 L.D. 550.
- Milwaukee, Lake Shore and Western Ry. Co. (12 L.D. 79); overruled, 29 L.D. 112.
- Miner *v.* Mariott *et al.* (2 L.D. 709); modified, 28 L.D. 224.
- Minnesota and Ontario Bridge Company (30 L.D. 77); no longer followed, 50 L.D. 359.
- *Mitchell *v.* Brown (3 L.D. 65); overruled, 41 L.D. 396 (See 43 L.D. 520).
- Monitor Lode (18 L.D. 358); overruled, 25 L.D. 495.
- Monster Lode (35 L.D. 493); overruled so far as in conflict, 55 I.D. 348.
- Moore, Charles H. (16 L.D. 204); overruled, 27 L.D. 482.
- Morgan *v.* Craig (10 C.L.O. 234); overruled, 5 L.D. 303.
- Morgan, Henry S. *et al.* (65 I.D. 369); overruled to extent inconsistent, 71 I.D. 22 (1964).
- Morgan *v.* Rowland (37 L.D. 90); overruled, 37 L.D. 618.
- Moritz *v.* Hinz (36 L.D. 450); vacated, 37 L.D. 382.
- Morrison, Charles S. (36 L.D. 126); modified, 36 L.D. 319.
- Morrow *et al.* *v.* State of Oregon *et al.* (32 L.D. 54); modified, 33 L.D. 101.
- Moses, Zelman R. (36 L.D. 473); overruled, 44 L.D. 570.

- Mountain Chief Nos. 8 and 9 Lode Claims (36 L.D. 100); overruled in part, 36 L.D. 551.
- Mountain Fuel Supply Company, A-31053 (December 19, 1969), overruled, 79 I.D. 216 (1972).
- Mt. Whitney Military Reservation (40 L.D. 315) (See 43 L.D. 33).
- Muller, Ernest (46 L.D. 243); overruled, 48 L.D. 163.
- Muller, Esberne K. (39 L.D. 72); modified, 39 L.D. 360.
- Mulnix, Philip, Heirs of (33 L.D. 331); overruled, 43 L.D. 532.
- Munsey, Glenn, Earnest Scott and Arnold Scott v. Smitty Baker Coal Company, Inc., 1 IBMA 144, 162 (Aug. 8, 1972), 79 I.D. 501, 509, distinguished, 80 I.D. 251 (1973).
- Myll, Clifton O., 71 I.D. 458 (1964); as supplemented, 71 I.D. 486 (1964), vacated, 72 I.D. 536 (1965).
- National Livestock Company and Zack Cox, I.G.D. 55 (1938), is overruled, United States v. Maher, Charles *et al.*, 5 IBLA 209, 79 I.D. 109 (1972).
- Nebraska, State of (18 L.D. 124); overruled, 28 L.D. 358.
- Nebraska, State of v. Dorrington (2 C.L.L. 647); overruled, 26 L.D. 123.
- Neilsen v. Central Pacific R.R. Co. *et al.* (26 L.D. 252); modified, 30 L.D. 216.
- Newbanks v. Thompson (22 L.D. 490); overruled, 29 L.D. 108.
- Newlon, Robert C. (41 L.D. 421); overruled so far as in conflict, 43 L.D. 364.
- New Mexico, State of (46 L.D. 217); overruled, 48 L.D. 98.
- New Mexico, State of (49 L.D. 314); overruled, 54 I.D. 159.
- Newton, Walter (22 L.D. 322); modified, 25 L.D. 188.
- New York Lode and Mill Site (5 L.D. 513); overruled, 27 L.D. 373.
- *Nickel, John R. (9 L.D. 388); overruled, 41 L.D. 129 (See 42 L.D. 313).
- Northern Pacific R.R. Co. (20 L.D. 191); modified, 22 L.D. 234; overruled so far as in conflict, 29 L.D. 550.
- *Northern Pacific R.R. Co. (21 L.D. 412, 23 L.D. 204; 25 L.D. 501); overruled, 53 I.D. 242 (See 26 L.D. 265; 33 L.D. 426; 44 L.D. 218; 117 U.S. 435).
- Northern Pacific R.R. Co. v. Bowman (7 L.D. 238); modified, 18 L.D. 224.
- Northern Pacific R.R. Co. v. Burns (6 L.D. 21); overruled, 20 L.D. 191.
- Northern Pacific R.R. Co. v. Loomis (21 L.D. 395); overruled, 27 L.D. 464.
- Northern Pacific R.R. Co. v. Marshall *et al.* (17 L.D. 545); overruled, 28 L.D. 174.
- Northern Pacific R.R. Co. v. Miller (7 L.D. 100); overruled so far as in conflict, 16 L.D. 229.
- Northern Pacific R.R. Co. v. Sherwood (28 L.D. 126); overruled so far as in conflict, 29 L.D. 550.
- Northern Pacific R.R. Co. v. Symons (22 L.D. 686); overruled, 28 L.D. 95.
- Northern Pacific R.R. Co. v. Urquhart (8 L.D. 365); overruled, 28 L.D. 126.
- Northern Pacific R.R. CO. v. Walters *et al.* (13 L.D. 230); overruled so far as in conflict, 49 L.D. 391.
- Northern Pacific R.R. Co. v. Yantis (8 L.D. 58); overruled, 12 L.D. 127.
- *Northern Pacific Ry. Co. (48 L.D. 573); overruled so far as in conflict, 51 L.D. 196 (See 52 L.D. 58).
- Nunez, Roman C. and Serapio (56 I.D. 363); overruled so far as in conflict, 57 I.D. 213.
- Nyman v. St. Paul, Minneapolis, and Manitoba Ry. Co. (5 L.D. 396); overruled, 6 L.D. 750.
- O'Donnell, Thomas J. (28 L.D. 214); overruled, 35 L.D. 411.
- Olson v. Traver *et al.* (26 L.D. 350, 628); overruled so far as in conflict, 29 L.D. 480; 30 L.D. 382.
- Opinion A.A.G. (35 L.D. 277); vacated, 36 L.D. 342.
- Opinion of Acting Solicitor, June 6, 1941; overruled so far as inconsistent, 60 I.D. 333.
- *Opinion of Acting Solicitor, July 30, 1942; overruled so far as in conflict, 58 I.D. 331 (See 59 I.D. 346, 350).
- Opinion of Associate Solicitor, Oct. 22, 1947 (M-34999); distinguished, 68 I.D. 433 (1961).
- Opinion of Associate Solicitor, M-36463, 64 I.D. 351 (1957); overruled, 74 I.D. 165 (1967).

- Opinion of Associate Solicitor, M-36512 (July 29, 1958); overruled to extent inconsistent, 70 I.D. 159.
- Opinion of Chief Counsel, July 1, 1914 (43 L.D. 339); explained, 68 I.D. 372 (1961).
- Opinion of Secretary, 75 I.D. 147 (1968); vacated, 76 I.D. 69 (1969).
- Opinion of Solicitor, October 31, 1917 (D-40462); overruled so far as inconsistent, 58 I.D. 85, 92, 96.
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NOTE.—The abbreviations used in this title refer to the following publications: "B.L.P." to Brainard's Legal Precedents in Land and Mining Cases, vols. 1 and 2; "C.L.L." to Copp's Public Land Laws edition of 1895, 1 volume; edition of 1882, 2 volumes; edition of 1890, 2 volumes; "C.L.O." to Copp's Land Owner, vols. 1-18; "L. and R." to records of the former Division of Lands and Railroads; "L.D." to the Land Decisions of the Department of the Interior, vols. 1-52; "I.D." to Decisions of the Department of the Interior, beginning with vol. 53.—EDITOR.

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DECISIONS OF THE DEPARTMENT OF THE INTERIOR

STATE OF WYOMING

9 IBLA 22

Decided *January 10, 1973*

Appeal from decisions of the Land Office, Cheyenne, Wyoming, No. W-26982; W-27006; W-28537 and W-28559; holding for rejection applications for State school land indemnity selections.

Affirmed.

School Lands: Indemnity Selections

A resurvey of either the base lands or the lands selected by a State will have no effect upon the State's right to further lieu selection.

APPEARANCES: A. E. King, Commissioner of Public Lands, State of Wyoming, and W. M. Sutton, Special Assistant Attorney General, State of Wyoming, for appellant; Assistant Solicitor, Division of Public Lands, for appellee.

OPINION BY MR. STUEBING INTERIOR BOARD OF LAND APPEALS

This opinion involves a consolidation of several Wyoming school land indemnity lieu selection appeals. Their facts will be set out separately; however, the same law may be applied to the disposition of all the appeals.

In the first case, IBLA 71-211, W-26982, several indemnity selections were clearlisted on various dates from 1899 to 1908 with the State of Wyoming offering sections of school lands as base. In each instance, the area offered as base was one unsurveyed section, presumably 640 acres. Subsequently, from 1944 to 1963, the subject base lands were either surveyed or platted by projection diagram and each was found to contain more than 640 acres per section. On the basis of the discovery of more than the standard number of acres in the base lands previously given up, the State of Wyoming made another application to select more lieu lands. By its decision of February 3, 1971, the Wyoming Land Office held the State's application for rejection.

The second case, IBLA 71-194, W-27006, involved several indemnity selections clearlisted on various dates from July 1901 to June 1918. Each of the sections offered as base had been surveyed and shown to contain 640 acres. Upon resurvey of these base sections, between 1915 and 1945, all the sections were found to contain more than 640 acres. The State of Wyoming offered this excess as base for a further selection and on February 1, 1971, the Wy-

ming Land Office held the application for rejection.

In the third case, Wyoming lieu selections W-28537 and W-28559, IBLA 71-307, the situation is reversed from that in the first two cases. Here, the State of Wyoming was invested with title to certain surveyed school sections in place on the date of its statehood, July 10, 1890. The survey at that time showed the sections involved contained 640 acres. Upon subsequent resurvey by the United States the sections were revised and from that revision the State of Wyoming determined the acreage of each section to be something less than 640 acres per section. On the basis of the State's recalculation of the number of acres in the resurveyed school sections, an indemnity selection application was filed for the balance. The application was held for rejection by the Wyoming Land Office on May 7, 1971.

The fourth case,¹ IBLA 71-279, involves a situation where the State was originally presumed to have one-half of a certain section 16 and all of a certain section 36 in Yellowstone National Park. One-half of section 16 was apparently in Montana. On that basis, the State made a selection of one and one-half sections elsewhere. Later, it was determined that all of section 16 was in the State of Montana. Wyoming does not contest the finding that it has an excess selection because of

the one-half of section 16 that is in Montana. However, the land which Wyoming selected in 1884 was dependently resurveyed in 1963 and it was determined that the selected section and a half contained 655.78 acres instead of the usual 960 acres. The State asks that the loss of 304.22 acres discovered by the dependent resurvey of the selected lands be offset by the admitted overselection of the half section, 320 acres, determined to be in Montana, thus leaving an overselection of only 15.78 acres. By its letter decision dated December 28, 1970, the Wyoming Land Office denied that request.

From all the above denials, the State of Wyoming appeals.

In the four cases the Bureau of Land Management used as a basis for its decisions the cases of *State of New Mexico*, 53 I.D. 222 (1930) and *State of New Mexico*, 51 L.D. 409 (1926). The former case held:

* * * When the State of New Mexico in 1915, prior to a survey in the field, offered all of Sec. 2 as base land for an indemnity selection it, by implication, accepted the protraction diagram as correct for the purposes of the case; having received the indemnity land for which it applied, the State is now estopped to assert anything to the contrary, or to make a further indemnity claim on account of the said Sec. 2.

The latter case states:

A deficiency in acreage caused by alleged gross inaccuracies in the surveys is not a ground for adjustment of a State grant, inasmuch as section 2396, Revised Statutes, declares that in the disposal of public lands the official surveys are to govern, and that each section or subdivision thereof shall be held and con-

¹ Apparently no serial number was assigned to this case by the Wyoming Land Office. The record consists principally of several items of correspondence.

January 10, 1973

sidered as containing the exact quantity shown on the plat.

The bulk of appellant's briefs are directed to distinguishing the above quoted cases and to quoting 43 U.S.C. §§ 851, 852 (1970). The pertinent provisions of these sections which relate to deficiencies in the States' grant of school land by reasons of settlement or otherwise and how to fill these deficiencies are set out as follows:

* * * And other lands of equal acreage are also appropriated and granted, and may be selected, in accordance with the provisions of section 852 of this title, by said State to compensate deficiencies for school purposes, where sections 16 or 36 are fractional in quantity, or where one or both are wanting by reason of the township being fractional * * *.

(b) Where the selections are to compensate for deficiencies of school lands in fractional townships, such selections shall be made in accordance with the following principles of adjustment, to wit: For each township, or fractional township containing a greater quantity of land than three-quarters of an entire township, one section * * * *Provided*, That the States which are, or shall be entitled to both the sixteenth and thirty-sixth sections in place shall have the right to select double the amounts named, to compensate for deficiencies of school land in fractional townships.

We believe that the disposition of each of these cases is governed by the decisions cited above. These decisions establish the rule that the extent of a State's right to receive a school indemnity grant is limited to the acreage shown by the official surveys (or protraction diagrams for unsurveyed lands), and where indemnity lands have been granted

by the United States in lieu thereof, subsequent discovery of deficiencies in acreage caused by inaccuracies in the surveys will not afford a new basis for adjustment of the grant. The rationale of this long-established rule is fully stated in the 1926 decision in *State of New Mexico, supra*:

In denying the State's claim for credit on account of the alleged deficiency, the Commissioner held that Section 2396, Revised Statutes, contemplated that in the disposal of public lands the official surveys are to govern, and that each section or sectional subdivision, the contents whereof have been returned by the surveyor general shall be held as containing the exact quantity expressed in the return that the design and purpose of this statute was to establish beyond dispute all lines and lines and monuments of accepted official surveys; to obviate inquiry and contention with respect to survey inaccuracies and place a statutory bar against attempts to alter the same or to set up complaints of deficiency of areas as a basis for resurvey. The Commissioner observed that aside from this statutory limitation, administrative reasons precluded the granting of the State's claim; that the stability of surveys and the title to lands described by reference thereto should be unassailable by parties finding differences in measurements and areas from those returned, and if transactions involving the disposition of public lands were not made final, and the Government was obliged to open up for readjudication the question as to the area of a particular tract or tracts granted and patented, controversies would be constantly arising and resurveys and readjudications would be interminable. (*Ibid.* at 411).

* * * * *

The Department has carefully considered the matter and finds no reason to differ with the conclusion reached by the

Commissioner. The provisions of section 2396, Revised Statutes, recognize the fact taught by experience that measurements of lands can not be performed with precise accuracy and that the work of no two surveyors would exactly agree. True, the alleged shortage in this case looms to a figure of impressive proportions but the very purpose of the declaration of law above referred to was to obviate inquiry and contention in regard to survey inaccuracies. Moreover, the recognition of right to an adjustment in this instance would establish a far-reaching precedent and afford a basis for similar claims by other States and a multitude of claims by individuals who had purchased Government lands and found the area short of that expressed on the plat of survey. Also, the rule works both ways, in favor of and against the United States. Manifestly the Government has no basis for claim to readjustment of boundaries or for further payment, or for restitution in those cases of certified or patented lands where there was an excess of acreage over that paid for or taken in harmony with the survey returns at the time of disposal. And if the returns are conclusive against the Government they must also be conclusive in its favor. Take the present case; the Government can not inquire into the contents of the school sections and subdivisions assigned by the State as basis for its indemnity selections, but accepts them as containing the exact quantity expressed in the return. Examination might disclose a deficiency in the area of these sections; frequently, no doubt, exchanges have been made of unequal areas, the discrepancy being in favor of the State, but the law gives these transactions repose and they can not be disturbed. Otherwise endless confusion would ensue. (*Ibid.* at 412).

The same principle was applied in the 1930 decision in *State of New Mexico, supra*, where it was held:

Where a State submits as base for an indemnity school selection an unsurveyed section within a national forest the area

of which was estimated by protraction, the adjudication of its claim for indemnity on that basis is final and the State will be estopped from asserting a claim for further indemnity on the ground that the section when surveyed was shown to contain a greater area than that estimated by the protraction. (Syllabus).

By application of this principle we can resolve the issues raised in the present four appeals.

The first two fact situations set out above will be discussed together for the reason that the only difference in the facts is that the base land in the first case was unsurveyed at the time of the transfer and in the second case the land had been surveyed prior to the transfer for lieu. In both cases, the base land was later determined to have more than 640 acres, or a greater number of acres than the land selected. The State of Wyoming, in both the first and second appeals, distinguishes their fact situations from the *New Mexico* case (53 I.D. 222, *supra*). Appellant points out that the *New Mexico* lieu selections were based on a protraction and in the Wyoming cases the first was not even protracted and the second involved a prior survey. The State next contends that the *New Mexico* (53 I.D. 222) case stands for the proposition that equity would, in situations such as the present case, allow the State to choose more land, pointing out that in the *New Mexico* case, the Department allowed the State to keep lieu lands mistakenly selected and approved on the basis of the resurveyed base. The distinction here, also made clear by the *New Mexico*

case, is that the Department did not recognize an equitable right to select additional land once the mistake was discovered. Although the State points to certain factual variations in the situations involved, the law is settled that once a State gives up its base and accepts lieu, the exchange is final.

The State, in cases one and two, next points to 43 U.S.C. § 851 which provides for lieu selections where the base had been in some manner taken from the State in whole or in part. The significant part of that statute, here, reads:

* * * *Provided*, That the selection of any lands under this section in lieu of sections granted or reserved to a State shall be a waiver by the State of its right to the granted or reserved sections. * * *

The intent of the statute is that once the exchange has been made the matter is settled, and no further adjustments may be made. This is pointed out in the cases discussed above.

The third case involves a situation where the State is asking a lieu selection based upon a resurvey of the base land which it still retains. Again the arguments relating to 43 U.S.C. §§ 2851 and 852 were utilized. The basic rule of law, as we see it, is that the area shown on the plat at the time title passes is to control what the State receives, and that a later survey will not affect that grant. This is the general principle set out in *State of New Mexico*, 51 L.D. 409, 412 (1926), and the cases cited at 43 U.S.C.A. § 752 N3 (1964). To rebut this, the State dis-

tinguishes the fact situation of *State of New Mexico*, case in that in the *New Mexico* case the State made the resurvey, but in the present case, the federal government made the resurvey. This does not change the fact that the grant was finalized at the time title passed to the State, and so the State is bound by the original plat upon which that grant was based.

One further question remains in the third appeal. The State enclosed a letter, 1364141 "F" WJC, dated January 30, 1930, from the General Land Office, Washington, to the Commissioner of Public Lands in Wyoming, granting the State a lieu selection for base in a situation closely resembling the present case. In light of our analysis of the precedent relied upon for our holding in this case, we cannot regard this letter as having continuing authority.

The fourth case involves the situation where the State selected lands were, by a dependent resurvey, determined to contain less than they had originally been shown to contain. The question involved in that situation has been decided in the first two cases discussed above. However, here the State also asserts an equitable ground. The State admittedly must reduce its entitlement to select lieu land to the extent of the half section of school land in place which was ultimately determined to be in Montana, not Wyoming. In return the State asks that it be allowed to offset the land lost by that resurvey against the half

section of selected land for which it admits it must now offer new base, leaving only an overselection of 15.78 acres. In support of its equity argument, the State cited the *State of New Mexico*, 53 I.D. 222 (1930), which grants equity by allowing the State to keep the already approved lieu lands selected on the basis of an enlarged resurveyed base section. The equities are not directly similar, in that the base land here was not ever in the State of Wyoming, so that no equitable interest therein can be vested in the State.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

EDWARD W. STEUBING,
Member.

WE CONCUR:

MARTIN RITVO, *Member.*

FREDERICK FISHMAN, *Member.*

CONCURRING OPINION OF FREDERICK FISHMAN

At first blush the main opinion's rationale in part suggests that the grant under the Lieu Selection Act [43 U.S.C. §§ 851-852 (1970)] is in terms of sections, not acres.

The opinion does not discuss the apparently disparate provisions of 43 U.S.C. § 851 (1970), which reads as follows:

Where settlements with a view of preemption or homestead have been, or shall hereafter be made, before the survey of

the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections or either of them have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State in which they lie, *other lands of equal acreage* are hereby appropriated and granted, and may be selected, in accordance with the provisions of section 852 of this title, by said State, in lieu of such as may be thus taken by preemption or homestead settlers. And other lands of equal acreage are also hereby appropriated and granted and may be selected, in accordance with the provisions of section 852 of this title, by said State where sections sixteen or thirty-six are, before title could pass to the State, included within any Indian, military, or other reservation, or are, before title could pass to the State, otherwise disposed of by the United States: *Provided*, That the selection of any lands under this section in lieu of sections granted or reserved to a State shall be a waiver by the State of its right to the granted or reserved sections. *And other lands of equal acreage are also appropriated and granted*, and may be selected, in accordance with the provisions of section 852 of this title, by said State to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever. And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and there upon the State shall be entitled to select indemnity lands to the extent of section for section in lieu of sections therein which have been or shall be granted, reserved, or pledged; but such selections may not be made within the boundaries of said reservation: *Provided, however*,

That nothing in this section contained shall prevent any State from awaiting the extinguishment of any such military, Indian, or other reservation and the restoration of the lands therein embraced to the public domain and then taking the sections sixteen and thirty-six in place therein. [Italics supplied]

Concededly the statute speaks of "section for section"; however, it also addresses itself to "other lands of equal acreage," a contradiction in many situations.

As I see it, the crucial point is the fact that the school indemnity statutes, *Rev. Stats.* §§ 2275 and 2276 were amended by the Acts of February 28, 1891, 26 Stat. 796, the Act of August 27, 1958, 72 Stat. 928, the Act of September 14, 1960, 74 Stat. 1024, and the Act of June 24, 1966, 80 Stat. 220 at which times Congress must be presumed to have known the interpretations put on the lieu selection law by the Department. That Congress did nothing by statute to change the administrative practice and interpretation is tantamount to Congressional approval thereof.

This view is buttressed by *State of Wyoming v. United States*, 310 F. 2d 566, 580 (10th Cir. 1962), *cert. denied*, 372 U.S. 953 (1963), as follows:

When Congress passed the Resurvey Act of 1908, it must be presumed to have known the construction which had been placed on the Resurvey Acts of 1903 and 1905 and the effect given to such earlier Acts by the Department of the Interior and the practices and procedures followed and carried out by such Department, with respect to the lands in the original school sections and resurveyed school sections. Therefore, when Congress enacted the Resurvey Act of 1908, without substantial

change in any relevant part, it manifested its approval and ratification of the administrative construction of the earlier Resurvey Acts by the Department of the Interior, the effect given thereto by such Department, and such practices and procedures. [Footnote omitted]

The soundness of this approach, in its evenhandedness and practicality, is articulated in *State of New Mexico*, 51 L.D. 409 (1926), quoted in the main opinion.

In view of the fairly consistent interpretation given by the Department to the lieu selection statutes and the reasonableness of such interpretation, I see no reason to depart therefrom and therefore concur in the main opinion.

JAMES C. GOODWIN

9 IBLA 139

Decided January 23, 1973

Review of recommended decision of Administrative Law Judge Dent D. Dalby, recommending reversal of a Bureau of Land Management decision rejecting applications for coal prospecting permits C-0127891, 0127926 and 0127927.

Affirmed as modified.

Coal Leases and Permits: Permits: Workability

The workability of any coal will ultimately be determined by two offsetting factors—(1) its character and heat-giving quality, whence comes its value, and (2) its accessibility, quantity, thickness, depth, and other conditions that affect the cost of its extraction. It must be considered a workable coal if its value, as determined by its character and heat-

giving quality, exceeds the cost of extraction.

Coal Leases and Permits: Permits: Workability

Workability as defined by the USGS is concerned with the economics of the intrinsic factors. Extrinsic factors such as transportation, markets, etc., are not considered. However, the cost of mining must be considered. In its classification of coal lands, USGS has anticipated and assumed the ultimate coming of conditions favorable for mining and marketing of any coal if the coal is workable in terms of the intrinsic factors. In this respect, the test of workability under the Mineral Leasing Act differs from the prudent man rule under the mining laws.

Coal Leases and Permits: Permits: Workability

Although workability is basically a problem of the physical parameters of the coal, the test of workability is dependent upon economic factors. If the value of the coal is greater than the cost of its extraction, the deposit is workable.

Coal Leases and Permits: Permits: Workability

Workability may be established by geologic inference where detailed information is available regarding the existence of a workable deposit in adjacent lands and there are geologic and other surrounding conditions from which the workability of the deposit can be reasonably inferred. However, geologic inference, as a tool for determining workability, has certain limitations. The mere fact that lands applied for adjoin other lands which contain workable coal deposits does not, per se, permit the inference that they contain coal deposits in workable quality and quantity.

Coal Leases and Permits: Permits

In determining whether lands are of such character as to subject them to leasing rather than prospecting under permits,

the Secretary of the Interior is entitled to rely upon the reasoned opinion of his technical expert, the Geological Survey. Only upon a clear showing that the Survey's determination was improperly made, will the Secretary act to disturb the determination.

APPEARANCES: Darrell J. Skelton, Esq., for James C. Goodwin; John F. Hughes, Esq., Office of the Solicitor, U.S. Department of the Interior, for the Bureau of Land Management and the U.S. Geological Survey.

OPINION BY MR. DAY OFFICE OF HEARINGS AND APPEALS

This matter is before the Board via a long, unusual, and circuitous route. It had its origin on April 20, 1966, when Mr. James C. Goodwin filed three applications for coal prospecting permits (Colorado 0127891, 0127926 and 0127927) pursuant to the provisions of the Mineral Leasing Act of February 25, 1920, *as amended*, 30 U.S.C. § 201 (b) (1970), hereinafter called the "Act".¹

On June 20, 1966, the Colorado Land Office denied the applications "because the lands are known to contain a workable coal deposit and are more properly subject to the leasing provisions of the Mineral Leasing Act than the prospecting provisions thereof." After Mr. Goodwin's appeal to the Director, Bureau of Land Management, was denied, he appealed to the Secretary. In a letter decision dated De-

¹ Appendix A contains a description of the original permit application and amendments.

January 23, 1973

cember 19, 1969, the Assistant Secretary of the Interior set aside the Bureau's decision and remanded the case for a hearing and a recommended decision by a Hearing Examiner "on the question of the existence and workability of such coal deposits as there may be in the land."²

Extensive hearings were held in Denver, Colorado, on April 20, May 1, and June 16, 17 and 18, 1970. In his recommended decision, dated November 3, 1970, the Judge concluded that the prospecting permits should be issued for the lands contained in the amended applications. On November 27, 1970, the Assistant Secretary requested the Board of Land Appeals to consider and decide the appeal.³ Upon request of the Bureau and appellant, oral argument was held on June 2, 1971.

This matter is novel in a number of ways. To the best of our knowledge, it is the first time a decision regarding the workability of a coal deposit has had the advantage of a hearing on the facts. Further, because the Assistant Secretary recognized "that there are strong differences of views on this subject" * * * and as to the proper criteria to be employed in cases of this kind," he permitted two USGS employees to

testify as witnesses for the appellant.⁴

In *Clear Creek Inn Corporation*, 7 IBLA 200, 213, 79 I.D. 571, 577-578 (1972), the Board clearly put cases of this nature in their perspective with respect to Departmental authority to determine workability and the burden of proof.

* * * It has long been accepted that it is for the Secretary or his delegate to determine whether, from the information which he has at the time he considers an application for prospecting permit, prospecting or exploratory work is necessary to determine the existence or workability of coal deposits. *D. E. Jenkins*, 55 I.D. 13 (1934). Of course, we recognize that the Geological Survey in conducting its field examinations and collection of other data is acting as the Secretary's expert and is providing technical advice so that a proper determination can be made in these matters. In addition, the Director of the Geological Survey has been expressly entrusted by Congress with the "classification of the public lands and examination of the geological structure, mineral resources, and products of the national domain." Act of March 3, 1879; 20 Stat. 377, 394; 43 U.S.C. § 31 (1970). Therefore, when the Geological Survey has concluded from all the available geological data that further exploration is, or is not, needed to determine the existence or workability of coal deposits in a particular area, the Secretary is entitled to rely upon the reasoned opinion of his technical expert in the field. *Roland C. Townsend*, A-30250 (September 14, 1965); *Carl Nyman*, 59 I.D. 238 (1946).

This accepted procedure has been followed consistently, placing a burden on the applicant to present a convincing and persuasive argument to rebut the conclu-

² The title "Hearing Examiner" was superseded by "Administrative Law Judge." 37 F.R. 18787 (August 19, 1972).

³ Jurisdiction over appeals to the Director, Bureau of Land Management, was delegated to the Board of Land Appeals, June 18, 1970. Cir. 2273, 35 F.R. 10009, 10012.

⁴ John P. Storrs, Regional Mining Supervisor, Branch of Mining Operations, and J. D. Turner, Chief of Branch of Mining Operations.

sions of the Geological Survey. Absent a clear showing that the Survey's determination was improperly made, the Secretary will not act to disturb a mineral classification or determination made by the Geological Survey, *Cf. Lillie Mae Yates*, A-26271 (February 8, 1952).

Under section 2(a) of the Act, the Secretary is authorized, in his discretion, to offer coal lands owned by the United States for leasing through competitive bidding. Under section 2(b) of the Act, the Secretary may issue prospecting permits "[w]here prospecting or exploratory work is necessary to determine the existence or workability of coal deposits in any unclaimed, undeveloped area * * *."

Each of the applications was rejected upon the basis of reports from the U.S. Geological Survey (USGS) that the lands applied for are known to contain a workable coal deposit and are therefore subject to leasing, rather than to prospecting. However, we hold that the record does not contain sufficient evidence to establish that the lands contain workable coal deposits.

The application lands lie in northwestern Colorado, about 12 miles northeast from Meeker, Colorado, at elevations varying from approximately 6,500 to 9,000 feet above sea level. The terrain is rugged and mountainous, cut by numerous canyons, and heavily vegetated, so that it is difficult to traverse, as well as to trace the continuity of such coal beds as may be exposed. The area is underlain by the coal bearing Williams Fork Formation of the Mesa Verde Group. Detailed geologic

mapping of the area by Hancock in 1925 (USGS Bulletin 757), and by Hancock and Eby in 1930 (USGS Bulletin 812c) show many coal occurrences throughout the Williams Fork Formation. Hancock and Eby estimated the multiple beds of coal to have a total of 62 feet under much of the area in T. 3 N., R. 93 and 94 W. in which the permit applications lie, and a total of 2 billion tons of available coal in the two townships.

In the surrounding area of the lands sought by Goodwin there were eleven existing coal leases issued under the Act at the time of the hearing. Several of the existing leases were issued in response to preference rights earned by Goodwin through discovery of commercial coal on previously issued prospecting permits.

There are two coal mines operating in the area. The Reinau mine, located about 5 miles south of C-0127926-7, is a seasonal operation producing between 10 and 20 tons per day for consumption in the Meeker area. The Redwing mine of Colowyo Coal Company, situated about 2 miles north of C-0127927 and 3 miles east of C-0127891, produces about 1,000 tons per day from the Collom bed during the peak season.

The Blue Streak mine, located about 1 and 1/2 miles south of C-0127926 and 1 mile southwest of C-0127927, operated until the late 1950's. Other abandoned mines in the vicinity include the Cornrike or Nine Mile mine, approximately 3

miles south of C-0127927, the Gentry mine, approximately 2 miles south of C-0127926, and the James mines, about $\frac{1}{2}$ mile north of C-0127927. An unnamed abandoned mine, in NW $\frac{1}{4}$ sec. 3, T. 3 N., R. 94 W., containing seams of coal of 1 foot 3 inches and 5 feet 8 inches separated by 4 inches of bone, was discovered within the area of C-0127891 by USGS engineers while investigating the subject applications. Nothing is known of the abandoned mine, but it is surmised that it was worked by a local rancher for his personal needs.

At least 31 holes have been drilled into or through the Williams Fork Formation in the vicinity of these applications. Almost all have encountered coal of varying character and thickness at different depths. Goodwin drilled six exploratory holes in connection with other prospecting permits at distances ranging from 1,000 feet to $6\frac{1}{2}$ miles south of C-0127926-7. As a result of his findings in these drill holes, he earned preference rights to coal leases.

A coal bed of 6 feet within 163 feet of the surface was observed in the Taylor well, approximately $1\frac{1}{4}$ miles southwest of C-0127927. The Sun Gossard oil well in SE $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 17, T. 3 N., R. 93 W., within the original area of C-0127926, showed 79 feet of coal in 10 beds, each greater than 4 feet thick. The Kilroy oil well, over 2 miles north of C-0127926, showed 116 feet of coal in 10 beds, each greater than 4 feet thick. The Van James test

hole, approximately $\frac{1}{4}$ mile from C-0127926 and C-0127927, showed seams of 4 and 12 feet. The Van James water well, approximately $\frac{1}{4}$ mile north of C-0127927, showed seams of 7 and 2 feet.

There are no known outcrops or other exposures of coal in any of the lands remaining in the three applications except the unnamed abandoned mine on C-0127891. Goodwin concedes that coal beds exist within the application areas, but maintains that the existing knowledge is not adequate to permit an inference of workability.

With regard to quality of the coal, the Government demonstrated that coal mined in the vicinity had heating capabilities between 10,500 to 12,000 BTU's and contended that coals having a minimum value of 8,500 BTU's were workable. Goodwin admitted that coals mined from the Williams Fork Formation meet the test for heating capacity, but was of the opinion that any coal having less than 10,000 BTU's would be difficult to market. However, as we discuss below, marketability is not at issue here.

Goodwin testified that his investigations show errors in the published literature on the Williams Fork Formation and coal beds therein, because of the failure by Hancock and Eby to establish accurate vertical control for their original studies. Goodwin stated that the thickening and thinning of the beds within very short distances precluded accurate inference as to lateral extent of the beds and made

any meaningful determination of workability, or correlation between the existing exposures of coal, almost impossible.

Goodwin contends that assumptions by the Government as to correlation of exposed coal beds are shown to be incorrect in light of more recent geological evidence and that the demonstrated errors in correlation limit the lateral extent of any exposed beds. The Government admitted that some assumed correlations it had used may be in error. Goodwin averred that there was no tracement of the Collum bed being mined in the Colowyo Redwing mine, and that the exposures of coal tended to show thickening and thinning within relatively short distances, *e.g.*, Hancock and Eby sites 340 and 345, where a 10-foot seam of coal went to 10 feet of bone in approximately one mile.

Goodwin also claimed that the stairstepping of geological formations from the transgression-regression break the continuity of the coal beds and that the coal shown in drill holes 35-1, 35-2, 25-1 and 28-1 indicate a thinning trend toward the north, into the area of applications C-0127926-7.

Dr. Robert G. Dickinson, a geologist employed in Branch of Mineral Classification, USGS, admitted the thickening-thinning nature of the beds, but could not tell where the change occurred, or if the changes were abrupt or gradual. He and other Government witnesses agreed that the coal formations could have

splits with the bone thickening and thinning.

Goodwin testified, without disagreement from the Government's witnesses, that splits had been encountered in the Reinau mine, as well as in the now-closed Blue Streak mine. Inferentially, it was suggested that the splits were a major factor in the closing of the Blue Streak.

Dr. Russell G. Wayland, Chief Conservation Division, USGS, maintained there were no serious problems due to lenticularity or thickening or thinning in the Williams Fork Formation, because if one seam pinched out, surely there would be another bed in the vertical series which could be mined.

Evidence of burning was reported by Hancock and Eby on the outcrops both north and south of the area in applications C-0127926-7, with no expression as to depth of burning, but with a comment that it was difficult to trace the lateral exposures of the coal because of the great amount of burning. Goodwin reported clinkered and burned coal in drill holes 25-1 and 28-1. In fact, only clinkered coal was encountered in hole 28-1 to its total depth of 490 feet. The burned coal at the bottom of hole 28-1 was approximately 1,850 feet back from the outcrop. In hole 25-1 the burning was approximately 2,500 feet from the outcrop. This is strong evidence that burning has extended through the entire distance from the outcrop to the drill holes. It was reported that coal

was burned to a distance between 100 and 200 feet from the outcrop at the Streeter mine. Goodwin reported other evidence of burned coal in hole 35-2 at a depth of 170 feet and in hole 35-1 at depths of 110, 130 and 250 feet. John P. Storrs, Regional Mining Supervisor, Branch of Mining Operations, USGS, testified that deep burning can be ascertained only by drilling. Dickinson thought the extensive burning to be vertical in extent, rather than lateral, contrary to Storrs' and Goodwin's assertions, but he admitted that closely spaced drill holes are the only method of determining the extent of underground burning. Wayland considered burning an irrelevant issue in these cases because of the general occurrence of multiple seams of coal in the Williams Fork Formation, and insisted that at least one of the many coal beds would surely be workable.

Goodwin pointed out, without contradiction, that widespread burning seriously affects the overlying rocks so that any attempt to mine through the burned area would be saddled with serious roof problems. He also asserted that the friable sands encountered in several of the drill holes indicate the possibility that the coal may be unworkable because of an inadequate roof or floor.

The appellant has presented specific evidence of discontinuity and lack of lateral extent of the coal beds, shown that there are coals of noncommercial thickness in the

area, pointed out errors in the Government's attempted correlations of coal seams, and shown other indications of conditions affecting the cost of extraction.

Goodwin recognizes that geologists may differ in the interpretation of the same data. In contrast to the broader geological approach taken by the Geological Survey, the appellant directed his evidence to the absence of specific data pertaining to the coal beds within the application area. It is his conclusion that the available information does not justify an inference that the deposits are workable because of the lack of continuity of the coal beds due to lenticularity, faulting, intrusion of dikes and splits, bone and burning. He asserts that the evidence does not establish the lateral extent of any coal bed.

The Government's position is based on generalities and broad inferences. USGS assumes workability where it can be shown that like quality products are being produced elsewhere. The Survey contends that the successful coal mining operations in the Colowyo mine together with the large number of outstanding coal leases and the general geology support its thesis that coal deposits underlying the areas sought by Goodwin are workable by legal definition.

The Government's reports and testimony, based on geologic inference has been successfully refuted by specific testimony and evidence as to the actual conditions. The topography and vegetation on the

lands make it difficult to trace a workable coal seam through the area. Hancock and Eby stressed that their correlations were only tentative. Goodwin showed that many of the correlations were in error. The Geological Survey failed to show a correlation of known workable seam of coal into or through the application lands. The Government admitted that its correlations of the James bed for six miles were in error. Storrs admitted that his previous correlation of Location 404 with the James mine was incorrect. He would now correlate Locations 408 and 409, crossing the area in C-0127926, but admits that this seam is thin (less than 2 feet thick), dirty and, therefore unworkable.

USGS by its testimony claims that the numerous drill holes and mines, both operating and abandoned, in the area show the presence of workable coal. We cannot agree. The variances in the height and number of seams in the holes and the inability of Dr. Dickinson to correlate the seams to our satisfaction weakens the Government's case when added to the distances of the drill holes and mines from the application lands in the rugged terrain. Therefore, it appears that USGS has failed to show it possessed appropriate information regarding continuity required to determine workability. *American Nuclear Corporation*, A-30808 (March 5, 1968).

The testimony of the USGS expert witnesses failed to adequately cover "other conditions that affect

the cost of extraction," brought out by Goodwin and mentioned in USGS Bulletin 537, p. 82.

The cost of mining coal is affected by many factors—such as cost of prospecting, shaft sinking, or other mine opening, surface and underground plant, perhaps community plant, water, supplies, timber, feed, and insurance—all of which vary from place to place or in accordance with the method of working the mine. Within the mine the main factors are mining rate, thickness, depth, and dip or pitch of bed, variations or irregularity in thickness, partings, "sulphur" or other impurities that must be removed, kind of roof or floor, presence of gas or water, provision for drainage and ventilation, haulage and hoisting, faults, and igneous intrusions.

Goodwin and his expert witnesses raised doubts in our minds as to the workability by specifically challenging the lack of knowledge of the dip or pitch, irregularity in thickness, partings, roof and floor, faults and intrusions. Further he presented specific findings based on available data contained in thereports, samples, and other evidence, while USGS was generally content to rely on broad inferences. Further, the USGS reports and testimony failed to follow the USGS criteria set out in Bulletin 537 and adopted by the Department in *Emil Usibelli*, A. Ben Shallitt, A-26277 (October 2, 1951). (Trans. p. 552.) Therefore, we must conclude that the applicant made a clear enough showing that the USGS determination was improperly made.

By this opinion, we are not requiring USGS to undertake comprehensive drilling programs, or to engage

in extensive exploratory investigation in order to determine if a prospecting permit should issue. *Clear Creek Inn Corporation, supra*. The intent of the Act is to allow exploratory work to determine the existence or workability of a coal deposit when the information is not known.

The Mineral Leasing Act does not define "workability." In the fulfillment of his duties under the Act of March 3, 1879, 20 Stat. 394, 43 U.S.C. § 31 (1970), the Director, Geological Survey, formulated policy guidelines to be followed in the classification of public lands and the examination of the mineral resource of the national domain. In 1913 the then Director, George Otis Smith, authored USGS Bulletin 537, "The Classification of the Public Lands," setting forth, *inter alia*, the factors to be considered in determining the workability of coal deposits.

The workability of any coal will ultimately be determined by two offsetting factors—(1) its character and heat-giving quality, whence comes its value, and (2) its accessibility, quantity, thickness, depth, and other conditions that affect the cost of its extraction. *It must be considered a workable coal if its value, as determined by its character and heat-giving quality, exceeds the cost of extraction, either as judged by actual experience at the point where it is found or as judged by actual experience on similar coals similarly situated elsewhere.* There are no absolute limits to any of the factors. The mining of 1 inch of coal that may involve the mining of 3 feet of rock is physically possible but would not pay. Most unworkable coal beds lack one or more of three things—quality, thickness, accessibility—that is, they are too poor,

too thin, or too deep. USGS Bul. 537, p. 67. (Italics added.)

This definition of workability was adopted by the Department in *Emil Usibelli A. Ben Shallit, supra*, a case which arose under the Alaska Coal Leasing Act, 38 Stat. 742, October 20, 1914, *as amended*, 41 Stat. 1363, March 4, 1921. The present Manual of the Conservation Division of the Geological Survey has the above definition set forth as its current policy. See Section 671.5.2 (b).

Although workability is basically a problem of the physical parameters of the coal, the test of workability is dependent upon economic factors. If the value of the coal is greater than the cost of its extraction, the deposit is workable. It is not enough to show that mining is physically possible. *Clear Creek Inn Corporation, supra*. The cost of extraction figured in the meaning of workability in *Usibelli* by reason of inaccessibility due to the prohibitive construction costs of railroad tunnels and bunkers on the mining site.

Workability as defined by the USGS is concerned with the economics of the intrinsic factors. Extrinsic factors such as transportation, markets, etc., are not considered. However, the cost of mining must be considered. In its classification of coal lands, USGS has anticipated and assumed the ultimate coming of conditions favorable for mining and marketing of any coal if the coal is workable in terms of

the intrinsic factors. In this respect, the test of workability under the Mineral Leasing Act differs from the prudent man rule under the mining laws.

A further differentiation from the "prudent man" requirement of "a reasonable prospect of success" was made in *Atlas Corporation*, 74 I.D. 76, 84 (1967).

* * * [I]t is not necessary, in order to sustain a finding that such deposits do exist in workable quantity, that a determination can be made with some degree of assurance that a mining operation will be an economic success. Rather, it is enough that the available data is sufficient to determine that the lands under consideration would require only limited prospecting to project a program for development but would not require prospecting for the purpose of determining the presence or workability of the deposit. [Italics supplied.]

Workability may be established by geologic inference where detailed information is available regarding the existence of a workable deposit in adjacent lands and there are geologic and other surrounding conditions from which the workability of the deposit can be reasonably inferred. *Atlas Corp., supra. See Diamond Coal and Coke Co. v. United States*, 233 U.S. 236, 249 (1914). However, geologic inference, as a tool for determining workability, has certain limitations. The mere fact that lands applied for adjoin other lands which contain workable coal deposits does not, per se, permit the inference that they contain coal deposits in workable quality and quantity. As pointed out in *Atlas, supra*, geologic and other surround-

ing conditions must lead reasonably to the inference of workability. It has been held that a coal prospecting permit may be issued for lands which adjoin other lands containing known workable deposits of coal but which themselves are not known to contain coal in workable quantity and thickness, *Clarence E. Felix, A-30197* (January 7, 1965), even where there were known outcrops of coal on the application lands. *Usibelli, supra*.

USGS and Goodwin agree with the general rule applied by the coal industry that an exposure of coal establishes the inferred existence of such deposit for a radius of one-half mile, absent known contravening factors such as faults. Goodwin admits that he attempted to include in his applications only lands more than a half-mile from known coal exposures. In cases where he was made aware that he had included lands within a half mile of known exposures, he withdrew all affected lands from the applications.

On past occasions when USGS believed workable coal was present on part, but not all, of the lands under application, it recommended that prospecting permits be issued only on those parts where there was not available sufficient evidence of the presence of workable coal. *Clarence E. Felix, supra*.

Accordingly, we hold that prospecting permits should be issued for all lands described in the applications with the exception of the following, which lie within one-half mile of known deposits of workable

coal deposits or regarding which Goodwin has not refuted USGS as to their workability:

(1) Within the area of inference of the abandoned mine located on C-0127891: N $\frac{1}{2}$ section 3 and E $\frac{1}{2}$ NE $\frac{1}{4}$ section 4;

(2) Within the area of inference of the Sun Gossard well and the Van James test hole within C-0127926: NE $\frac{1}{4}$, E $\frac{1}{2}$ NW $\frac{1}{4}$ section 20 and all lands in sections 21 and 28; and within C-0127927: all lands in section 28;

(3) Within the area of inference of the Van James water well within C-0127927: NE $\frac{1}{4}$ NE $\frac{1}{4}$ section 22 and NW $\frac{1}{4}$ NW $\frac{1}{4}$ section 23.

Therefore, pursuant to the authority delegated to the Board, 43 CFR 4.1, the recommended decision of the Administrative Law Judge is affirmed as modified and the applications are remanded to the Bureau of Land Management for action consistent herewith.

JAMES M. DAY,
Ex Officio Member.

I CONCUR:

NEWTON FRISHBERG, *Chairman.*

I DISSENT:

MARTIN RITVO, *Member.*

APPENDIX A

JAMES C. GOODWIN—Coal Prospecting Permit Applications—Land Description

The original permit applications, dated April 20, 1966, included the following described lands:

C-0127891 (3,926.49 acres): T. 3 N., R. 93 W., 6th P.M.—Sec. 6: SW $\frac{1}{4}$ SW $\frac{1}{4}$; Sec. 7: Lots 1, 2, 3, 4, 5, 10, E $\frac{1}{2}$ NW $\frac{1}{4}$, E $\frac{1}{2}$. T. 3 N., R. 94 W., 6th P.M.—Sec. 1: All; Sec. 2: All; Sec. 3: All; Sec. 4: E $\frac{1}{2}$ E $\frac{1}{2}$; Sec. 9: NE $\frac{1}{4}$ NE $\frac{1}{4}$; Sec. 10: N $\frac{1}{2}$ N $\frac{1}{2}$; Sec. 11: SW $\frac{1}{4}$ SE $\frac{1}{4}$, N $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$, N $\frac{1}{2}$; Sec. 12: Lots 1, 3, NW $\frac{1}{4}$ SE $\frac{1}{4}$, N $\frac{1}{2}$.

C-0127926 (2,097.98 acres): T. 3 N., R. 93 W., 6th P.M.—Sec. 17: E $\frac{1}{2}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$; Sec. 20: Lot 1, NE $\frac{1}{4}$ SE $\frac{1}{4}$, W $\frac{1}{2}$ SE $\frac{1}{4}$, SW $\frac{1}{4}$, E $\frac{1}{2}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$; Sec. 21: Lots 1, 3, 5, 7, 10 NW $\frac{1}{4}$ SE $\frac{1}{4}$, N $\frac{1}{2}$ SW $\frac{1}{4}$, N $\frac{1}{2}$; Sec. 28: Lots 6, 7; Sec. 29: Lots 2, 3, 5, NW $\frac{1}{4}$; Sec. 30: SW $\frac{1}{4}$ SE $\frac{1}{4}$, N $\frac{1}{2}$ SE $\frac{1}{4}$, NE $\frac{1}{4}$, W $\frac{1}{2}$.

C-0127927 (2,703.82 acres): T. 3 N., R. 93 W., 6th P.M.—Sec. 13: SW $\frac{1}{4}$ SE $\frac{1}{4}$, S $\frac{1}{2}$ SW $\frac{1}{4}$; Sec. 14: SE $\frac{1}{4}$; Sec. 22: Lots 10, 11, 14, 20, 22, SW $\frac{1}{4}$ SE $\frac{1}{4}$, E $\frac{1}{2}$ E $\frac{1}{2}$; Sec. 23: All; Sec. 24: W $\frac{1}{2}$, W $\frac{1}{2}$ E $\frac{1}{2}$; Sec. 25: N $\frac{1}{2}$ SW $\frac{1}{4}$, NW $\frac{1}{4}$; Sec. 26: N $\frac{1}{2}$; Sec. 27: Lot 1, SW $\frac{1}{4}$ NW $\frac{1}{4}$, E $\frac{1}{2}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$; Sec. 28: Lots 2, 19.

On June 6, 1966, permit C-0127927 was amended to include 320 additional acres described as S $\frac{1}{2}$ sec. 26, T. 3 N., R. 93 W., 6th P.M.

On September 25, 1967, the following described lands were deleted from the permit applications:

C-0127891 (777.86 acres deleted, leaving a total of 3,148.63 acres in permit application area): T. 3 N., R. 93 W., 6th P.M.—Sec. 6: SW $\frac{1}{4}$ SW $\frac{1}{4}$; Sec. 7: Lots 1, 2, 3, 4, 5, 10 E $\frac{1}{2}$ NW $\frac{1}{4}$, E $\frac{1}{2}$. T. 3 N., R. 94 W., 6th P.M.—Sec. 1: SE $\frac{1}{4}$ SE $\frac{1}{4}$; Sec. 12: Lots 1, 3, E $\frac{1}{2}$ NE $\frac{1}{4}$.

C-0127926 (240.00 acres deleted, leaving a total of 1,857.98 acres in permit application area): T. 3 N., R. 93 W., 6th P.M.—Sec. 17: E $\frac{1}{2}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$.

DISSENTING OPINION BY MR. RITVO

I dissent from so much of the decision as remands the applications

to the Bureau of Land Management for the issuance of coal prospecting permits in part.

I would affirm the decision of the Director, Bureau of Land Management, which affirmed a decision of the Colorado Land Office, Bureau of Land Management, rejecting the applications in their entirety. A statement of my views will be filed later.

**WILLIAM H. CASEY,
G. N. AND M. SHARP,
A PARTNERSHIP,
INTERVENOR**

9 IBLA 163

Decided January 26, 1973

Appeal by the intervenor from decision by the Bureau of Land Management remanding Casey's section 3 grazing permit case (Nevada 6-68-1) to the District Manager for consideration on its merits of an application filed by him to transfer a portion of the grazing privileges attached to his base land to other lands acquired by him.

Affirmed as modified.

Grazing Permits and Licenses: Base Property (Land): Generally—Grazing Permits and Licenses: Base Property (Land): Commensurability—Grazing Permits and Licenses: Base Property (Land): Transfers

Where a grazing permittee has been given two consecutive years in accordance with 43 CFR 4115.2-1(e) (9) (i) within which to increase the production of his base property or suffer the loss of all or part of his base property qualifications and, where after two growing seasons

have passed but not two full years, he files an application to transfer some of the qualifications from his base property to other land acquired by him, his base property qualifications are still in good standing at the time of filing the transfer application because the term "two consecutive years" specified in the regulation means two consecutive application years and not two growing seasons. Accordingly, the District Manager should have considered the transfer application on its merits.

Grazing Permits and Licenses: Base Property (Land): Generally—Grazing Permits and Licenses: Base Property (Land): Transfers

Where an application to transfer base property qualifications to other land owned by an applicant is approved, the transfer is effective as of the date the transfer application was filed. A sale at a later date by the proposed transferee would not affect the transfer, and the District Manager properly may consider the transfer application if the purchasers of the property have indicated an interest in obtaining any grazing privileges for which that land is base property.

Words and Phrases

"Two Consecutive Years." The term "two consecutive years" in 43 CFR 4115.2-1(e) (9) (i) means two consecutive application years and not two growing seasons.

APPEARANCES: W. Howard Gray, Esq. of Reno, Nevada, Gray, Horton and Hill, for appellant; Charles E. Evans, Esq., of Elko, Nevada, for appellee.

**OPINION BY MRS. LEWIS
INTERIOR BOARD OF LAND
APPEALS**

This is an appeal to the Secretary of the Interior by G. N. and M.

Sharp, a Partnership, the intervenor, from the decision of October 13, 1969, *amended* November 14, 1969, by the Office of Appeals and Hearings, Bureau of Land Management, which affirmed the Administrative Law Judge's¹ decision of May 15, 1969, pertaining to the grazing privileges of William H. Casey under section 3 of the Taylor Grazing Act, 43 U.S.C. § 315b (1970), in the Nyala Unit of Nevada Grazing District No. 6. The Judge's decision affirmed a decision of the Bureau's Battle Mountain, Nevada, District Manager, dated January 22, 1968.

The Bureau decision held that the "two consecutive years" specified in the regulation at 43 CFR 4115.2-1 (e)(9)(i) means two consecutive application years and not two growing seasons, and an application to transfer grazing privileges attached to the base property to the newly acquired Goss Ranch lands, which application was filed before the expiration of the second application year, is timely filed, and the base property qualifications of licensee Casey are in good standing.

The Bureau further held that when its decision became final, the case would be returned to the District Manager, through the State Director, for consideration of the transfer application on its merits.

In the instant appeal, G. N. and M. Sharp contends that Casey has

now sold the Goss Ranch land and that all holdings of the Bureau's decision are moot. Sharp further contends that Casey is in the same position as before he acquired the Goss Ranch property and that the Casey property, exclusive of the Goss Ranch land, will support no more than 4,844 AUMs. Sharp disagrees with the interpretation of the two-year rule but thinks it is moot.

Casey filed an answer alleging that the notice of appeal was never served on him; that neither the notice of appeal nor the statement of reasons was timely filed; and that, as he owned the Goss Ranch land on January 17, 1968, the date of his application to transfer the grazing privileges, the transfer would be effective as of January 17, 1968, and the privileges would attach to the Goss Ranch land as of that date, and the later sale of the land would not affect the validity of such transfer. Casey requested that the appeal be dismissed. Sharp filed a reply to Casey's answer. For the reasons stated below, the request to dismiss the appeal is denied.

We find no merit in the procedural objections made by Casey. The signed return receipt shows that the notice of appeal was served on the attorney for Casey. As the decision was served on Sharp on November 10, 1969, he had 30 days thereafter plus a 10-day grace period if he mailed the notice of appeal during the 30 days. As the notice of appeal was filed on December 11, 1969, it was timely filed. Sharp then had 30 days dating from

¹ The change of title of the hearing officer from "Hearing Examiner" to "Administrative Law Judge" was effectuated pursuant to order of the Civil Service Commission, 37 F.R. 16787 (August 19, 1972).

the time of filing the notice of appeal to file his statement of reasons. As he filed such statement of reasons on January 7, it also was timely filed.

With respect to the substantive questions, the record shows the following:

On October 27, 1967, Casey filed an application with the District Manager, Bureau of Land Management, Battle Mountain, Nevada, in which he requested a license for 399 animal unit months (AUMs) of forage on an active use basis and 5,339 AUMs on a nonuse basis, for a total of 5,738 AUMs. By decision of January 22, 1968, the District Manager held that the forage production of Casey's base property was sufficient to issue a license for only 4,844 AUMs, or a reduction of 894 AUMs.

Casey appealed the decision, contending that the District Manager was in error as he failed to take any action on a pending application filed by Casey to transfer a portion of his base property qualifications to other property owned by him, called the Goss Ranch land, that would provide sufficient forage to justify the issuance of a license for all of the AUMs requested.

A hearing on the appeal was held by the Judge on December 11, 1968. Casey, the District Manager and G. N. and M. Sharp all appeared and were represented by counsel.

The Judge concluded that if the productivity of base property declines, grazing privileges are lost under 43 CFR 4115.2-1(e)(9)(i)

only after the expiration of two consecutive application years and then only if nonuse has not been granted for those privileges that cannot be utilized due to the insufficient production of the base property. Accordingly, he held that as Casey was issued licenses during 1966 and 1967 granting nonuse for those privileges that could not properly be utilized due to the lack of productivity on his base property, and as two consecutive application years did not intervene between the time of the District Manager's letter of April 15, 1966, and January 17, 1968, the date of filing the transfer application, Casey had not lost any grazing privileges under the regulation at the time the transfer application was filed. He, therefore, remanded the case for appropriate action on the transfer application.

The Bureau and G. N. and M. Sharp appealed to the Director, Bureau of Land Management. The Office of Appeals and Hearings affirmed the Judge and remanded the case to the District Manager for consideration of the transfer application on its merits.

In affirming, The Bureau decision noted:

In the case of *Mrs. C. B. Stark*, Nevada 6-62-2 (January 28, 1964), the Bureau stated, "It is hereby construed that the 'two consecutive years' referred to * * * is interpreted to mean two consecutive application years and not two calendar years * * *." In *Jack G. Taylor*, A-31014 (June 25, 1969), in discussing the regulation, 43 CFR 4115.2-1(e)(9), the Department held that the "intent of the regulation is to require an applicant to assert his demand timely so that it can

January 30, 1973

be adjudicated and to bar one who does not do so within a period of 2 years from thereafter pressing his claim." The Department also stated in *Anawalt Ranch & Cattle Co., et al.*, 70 I.D. 6 (1963), that "the decision establishing base qualifications at a limit commensurate with the extent to which it was covered by the appellant's applications for 2 years immediately preceding was correct * * *." (Italics supplied by the Bureau.)

As to the interpretation of "two consecutive years," we affirm and adopt the rationale and finding of the decision of The Bureau.

We agree with appellants that the sale by Casey of the Goss Ranch land reduces his base property commensurability.

With respect to the Goss Ranch land, which has now been sold by Casey, while there seems to be no precedent on this issue, we agree with Casey that the transfer application, if it were approved on its merits, would be effective as of January 17, 1968, the date his transfer application was filed, and while he owned the land. 43 CFR 4115.2-2 (b)(3).² Therefore, the grazing privileges requested to be transferred would then be attached to that land, and the sale of the land by him at a later date would not affect the transfer. Under the doctrine of "relation back" as stated above, it could possibly have an ef-

fect on the rights of the purchasers of the base property to the grazing privileges attached thereto under 43 CFR 4115.2-2. The grantees named in the deed are George A. Manley and Linda M. Manley. If the latter have expressed an interest in obtaining any grazing privileges to which the base land is entitled, the transfer application should be considered on its merits.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1 (1972), the decision below is affirmed as herein modified, and the case record is returned to the Bureau of Land Management for any action that may be deemed necessary or advisable in accordance with this decision.

ANNE PIONDEXTER LEWIS,
Member.

WE CONCUR:

FREDERICK FISHMAN, Member.

NEWTON FRISHBERG, Chairman.

FRANKLIN PHILLIPS

v.

KENTUCKY CARBON
CORPORATION

2 IBMA 5

Decided January 30, 1973

Appeal from a decision of William Fauver, Administrative Law Judge (formerly Departmental Hearing Examiner), reinstating the employment of a coal miner pursuant to section

² This regulation provides in applicable part:

(3) * * * Upon approval of the application by the District Manager after reference to the advisory board, the transfer shall be effective as of the date of filing of the application, and the base property from which the transfer is made will thereupon lose its qualifications to the extent indicated in the transfer. (Italics supplied.)

110(b) of the Federal Coal Mine Health and Safety Act of 1969.

Reversed.

Federal Coal Mine Health and Safety Act of 1969: Entitlement of Miners: Discharge: Burden of Proof

Proof by a discharged miner that he has notified only a member of the mine safety committee of an alleged violation or danger without showing a notice or instigation thereof to the Secretary or his authorized representative fails to sustain the burden of proving a violation of section 110(b)(1)(A) of the Act.

Federal Coal Mine Health and Safety Act of 1969: Administrative Procedure: Generally

The Board may be persuaded by the findings of fact in an arbitration proceeding where they are made a part of the record, but the Board is not bound or controlled thereby.

APPEARANCES: R. G. Kelly, Esquire, Charles Q. Gage, Esquire, of Jackson, Kelly, Holt, & O'Farrell, attorneys for Kentucky Carbon Corporation; Joseph W. Justice, Esquire, of Burke & Justice, attorneys for Franklin Phillips; and Guy Farmer, Esquire, attorney for Bituminous Coal Operators' Association, amicus curiae.

OPINION BY THE BOARD INTERIOR BOARD OF MINE OPERATIONS APPEALS

Procedural Background

On May 28, 1971, Franklin Phillips (applicant) filed a Petition for Reinstatement to Employment as a Result of Discriminatory Discharge under section 110(b)(1)(A)

of the Federal Coal Mine Health and Safety Act of 1969 (the Act)¹ with the Office of Hearings and Appeals, Arlington, Virginia. On June 22, 1971, Kentucky Carbon Corporation (Kentucky Carbon) filed a Motion to Dismiss and Answer, and on October 15, 1971, filed a Motion for Summary Decision. The Administrative Law Judge, on October 15, 1971, ordered Phillips to amend or to show cause why his application should not be dismissed, to which Phillips responded on November 12, 1971. On November 18, 1971, Kentucky Carbon filed its Statement in Response to Applicant-Petitioner's Response to Order to Show Cause. The Judge denied Kentucky Carbon's Motion to Dismiss and Motion for Summary Decision on November 22, 1971. A hearing was held December 10, 1971, and a decision was issued in favor of Phillips on June 8, 1972. Kentucky Carbon filed a Notice of Appeal with this Board on June 28, 1972, and Bituminous Coal Operators' Association (BCOA) filed a petition on July 18, 1972, to participate as amicus curiae, which was granted by the Board. Timely briefs were filed by the parties, and oral argument before the Board was held August 24, 1972.

Factual Background

Franklin Phillips was a regular employee of Kentucky Carbon Corporation at its Ken-Car No. 1 Mine at Phelps, Kentucky. On April 28,

¹ P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

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1971, he reported for work on the second shift (4 p.m.) to perform duties as a shuttle car operator² in the No. 1 section. Phillips had hauled several loads of coal when it became apparent to him that water sprays on the loading machine were operating inadequately. The loading machine operator, Ermil Justice, also recognized that a problem existed and requested Phillips to get some tools with which the malfunctioning water sprays could be disassembled. The loading machine, which transferred coal from the working faces to the shuttle cars, was provided with water sprays to retard coal dust from "boiling up" as the coal hit the bottom of the shuttle cars (Tr. 13).³ Ermil Justice and Phillips removed several water spray heads and were in the process of cleaning them when the section foreman, H. E. Edwards, appeared on the scene. Phillips and the foreman exchanged words relating to the temporary work stoppage and tempers grew short. Edwards ended the conversation by firing Phillips, who then left the mine.

There is some evidence in the record that Edwards had at times displayed to some of the miners a short temper and an intolerance of safety complaints related to the mine's op-

eration. It also appears that Phillips had made various complaints to Edwards and to a union mine safety committee member prior to his discharge.

Phillips did not seek any immediate redress of the incident and two days afterward was given a discharge slip—"For interfering with the operation of the mine and abridging the rights of management. Also refusing to obey a direct and proper order" (Ex. 1). On May 6, 1971, the United Mine Workers of America (UMWA), on behalf of Phillips, filed a grievance under the applicable arbitration provisions of the National Bituminous Coal Wage Agreement of 1968, alleging that Phillips had been unjustly discharged. The final decision by the umpire on this grievance, dated June 21, 1971, was in favor of management (Kentucky Carbon), and was based in part on Phillips' own admission (Ex. 4(a), p. 65)⁴: "In this case the grievant (Franklin Phillips) admits that he refused to work and obey a direct order of management to perform his duties * * *." (Ex. 4(c), p. 11.)

Contentions of the Parties

Kentucky Carbon contends that Phillips failed to prove by a preponderance of the evidence that he was discharged because he had notified the Secretary or his authorized

² Shuttle Car Operator: "In bituminous coal mining, one who drives an electrically powered truck (shuttle car) in a coal mine to transport coal from the excavation point to the conveyor belt." *A Dictionary of Mining, Mineral and Related Terms* at 1007 (P. Thrush ed. 1968).

³ References to pages of the transcript of hearing will be abbreviated as "(Tr. —)" in this decision. References to exhibits which were accepted as part of the record will be noted as "(Ex. —)".

⁴ Q. 22 "Did you hear the section foreman tell you to get back on your shuttle car and haul coal?"

A. "He told me to haul, but I said I wouldn't haul in that dust—it was too dusty."

representative of any alleged violation or danger, but in fact was discharged for another reason, *i.e.*, that he refused to work. The strict interpretation of the term "Secretary" as defined in section 3(a) of the Act is urged.

Phillips argues that his complaint to a member of the mine safety committee or to the union safety coordinator of an alleged safety violation is equivalent to a complaint to the Secretary under section 110(b)(1)(A) of the Act and contends that the remedial purposes of the Act require that section 110(b)(1)(A) be given a broad and liberal interpretation. In sum, his case is that he was discriminatorily discharged in violation of section 110 of the Act for having made a report to a mine safety committee-man and that the Judge's decision and findings of fact are supported by substantial evidence.

The points argued by BCOA as amicus curiae are: first, that Phillips made no report to the Secretary or his authorized representative and that the Judge erred by interpreting section 110(b)(1)(A) to mean that an employee's complaint on a safety matter to a member of the local union safety committee is equivalent to making a safety complaint to the Secretary or his authorized representative; and second, that the Judge erred in refusing to find the umpire's ruling controlling where, in an arbitration proceeding instigated by Phillips, his discharge was found to be justified.

Issues Presented on Appeal

I

Did Phillips prove by a preponderance of the evidence that he was discharged for the reason that he had notified the Secretary or his authorized representative of any alleged violation or danger so as to bring his discharge under the protective provisions of section 110(b)(1)(A) of the Act?

II

Is a determination made by an umpire pursuant to a collective bargaining agreement on the matter of a miner's discharge binding upon an Administrative Law Judge or this Board in a proceeding brought under section 110(b) of the Act?

I

It is undisputed that Franklin Phillips was discharged by Kentucky Carbon on April 28, 1971. The Administrative Law Judge made the following Findings of Fact with respect to the reason for the discharge:

33. I find from the evidence as a whole that the foreman's discharge of the Applicant was arbitrary and discriminatory against the Applicant because of his activities in complaining to the foreman and the Mine Safety Committee about safety and health conditions and because of the Applicant's safety activities in assisting other miners in corrective maintenance to prevent exposure to excessive and hazardous coal dust.

34. I find further that the motivating factor in the discharge of the Applicant was an intent to penalize him for such

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safety complaints and safety activities, and to set an example for other employees not to complain of safety and health conditions or interrupt production by making necessary safety adjustments and repairs.

We find no substantial evidence in the record to support the above two findings. We find instead that the preponderance of the evidence manifested by the testimony of Phillips before the Administrative Law Judge (Tr. 14-15) and before the umpire (Ex. 4(a), p. 65) Ermil Justice (Tr. 31), and H. E. Edwards, the foreman (Tr. 110), and Exhibit 1 establishes the reason for the discharge to be the refusal of Phillips to obey the direct order of the foreman to haul coal. Although the foreman's action may be looked upon as harsh or extreme, it is not within the province of the Judge or this Board to find that he had no authority to discharge any miner who disobeyed an order to work or otherwise acted in an unreasonable manner. We note that the umpire in the arbitration proceeding concluded, "As unpleasant as it is, the umpire must find that *the management had the right under such circumstances to discharge the employee (italics added)* (Ex. 4(c), p. 11). We are concerned here only with the question of whether the discharge was in violation of section 110(b) (1) (A) of the Act. The principal objective of that section is to preserve the integrity of the Act and not to provide a new forum for the litigation of management and labor grievances.

Included among the Administrative Law Judge's Conclusions of Law were the following:

3. An employer's discrimination against a coal miner because the miner has notified his Mine Safety Committee (or one of its members) of an alleged safety violation or danger at the mine is a violation of section 110(b) (1) (A) of the Act.

4. Respondent violated section 110(b) (1) (A) of the Act by discharging the Applicant on April 28, 1971, because he had notified his Mine Safety Committee of alleged safety violations and dangers in the No. 1 Section of Respondent's mine.

We hold these two Conclusions of Law to be an erroneous construction of the Act for reasons set forth herein.

In this appeal, Phillips contends that his frequent safety complaints to foreman Edwards and occasionally to members of the mine safety committee motivated his discharge. Assuming *arguendo*, that the foreman *did* know of such reports to a safety committeeman and was motivated by them, this alone would not make a prima facie case under section 110 of the Act. The scope of the protection afforded by section 110(b) (1) (A) is narrow. See *Munsey v. Smitty Baker Coal Co. Inc.*, 1 IBMA 144 at 154, 79 I.D. 501, 505 (1972), wherein we stated:

* * * However, the plain language of clause (A) of subsection 110(b) (1) limits the protection to reporting alleged violations or dangers to the Secretary or his authorized representative. *It does not protect the making of general safety protests or the reporting of alleged violations or dangers to fellow employees, supervisors, or the management of the coal mine.* * * * (Italics added)

We find nothing in the record to support a finding or an inference that Phillips either reported or intended to initiate a reporting process to the Secretary or his authorized representative, or that management in discharging him was motivated by such belief. We hold, therefore, that Phillips failed to prove entitlement to reinstatement or back wages pursuant to section 110(b) of the Act and that the contrary ruling of the Judge must be reversed.

II

BCOA, as *amicus curiae*, contends that the Judge erred by refusing to find as controlling the umpire's determination that Phillips was discharged for refusing to work. In support of its contention, BCOA submits that Phillips had contracted to arbitrate his grievance pursuant to the union wage agreement, *supra*, and points out that the arbitrator's ruling was subsequently appealed to the Regional Director of the National Labor Relations Board (NLRB), who refused to assert jurisdiction (ostensibly on the ground that the arbitration proceeding was determinative of the issue). BCOA submits that there are sound policy considerations why the Board should follow the lead of the NLRB and defer to the umpire's decision. We cannot agree with this view.

In reversing the Judge's decision in this case, it so happens that we have reached the same result as that of the umpire, but we did so by

virtue of the record before us and not because we were controlled or bound by the umpire's findings and determination. He made his decision pursuant to the arbitration provisions of the union wage agreement and the record presented to him. He expressly stated in his decision that he had "no authority to interpret or enforce the regulations of the Federal [Coal Mine] Health and Safety Act" and declined to rule on the question as to whether the discharge violated any rights granted to the applicant under that Act (Ex. 4(c), p. 10). We may very well consider and weigh the findings of fact of an arbitrator for whatever they may be worth as persuasive in reaching our decision provided such findings are made a part of the record before us, but we are not bound by his decision. Our duty, unlike his, is to rule only on the question of whether the discharge violates the provisions of section 110(b) of the Act.

As delegates of the Secretary, we are obliged by the mandate of section 110(b)(2) of the Act to: (1) see that an investigation is made of alleged violations of section 110(b)(1); (2) provide an opportunity for a public hearing; and (3) make a decision, independent of other administrative forums, determining the rights of the parties under the provisions of the Act. Should we defer to an umpire's decision made under the National Labor Relations Act of 1947 (NLRA), or an arbitration agreement, as controlling upon us, we would be abdicating the

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statutory obligations assigned to the Secretary by the Congress. These two public laws (NLRA and the Act) are inherently different, designed to accomplish different objectives, and have been assigned by Congress to different agencies for administration and enforcement. In *NLRB v. Pacific Intermountain Express Co.*, 228 F.2d 170, 176 (8th Cir., 1955) the Court said:

* * * Each fact-finding agency is entitled to make its own decision upon the evidence before it, and the fact that another tribunal has reached a different conclusion upon the same issue arising out of the same transaction does not invalidate any decision which has proper evidentiary support. * * *

BCOA also expresses concern that our Departmental decisions may have the effect of undermining the grievance and arbitration procedures promulgated under the union wage agreement. This is neither the intent of the Act nor of the Board. As we stated in *Munsey, supra*, 1 IBMA at 158 and 79 I.D. 507:

* * * Section 110 of the Act may not be broadened to provide relief for all unfair or unjust labor practices, and may not be used as a vehicle for resolving grievances which are subject to arbitration under a labor contract or disputes under general labor law.

Although the Board may be influenced by the persuasiveness of an umpire's findings in an arbitration proceeding if, as stated above, it is incorporated into the record of a case before us, we hold that this Board is not bound or controlled thereby in determining the rights of the parties under the Act. We reverse the Administrative Law Judge on the merits of this case, but we find no error committed by him in failing to treat the umpire's decision as binding or controlling upon him.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the Order of the Administrative Law Judge, issued June 8, 1972, reinstating applicant, Franklin Phillips, to employment and awarding other damages, IS REVERSED and the application IS DENIED.

C. E. ROGERS, JR., *Chairman.*

DAVID DOANE, *Member.*

HOWARD J. SCHELLENBERG, JR.,
Alternate Member.

**APPEALS OF CEN-VI-RO OF
TEXAS, INC.****IBCA-718-5-68****IBCA-755-12-68***Decided February 7, 1973***Appeals Under Contract No. 14-06-D-5028, Specifications No. DC-6000 and Contract No. 14-06-D-5244, Specifications No. DC-6130.****Canadian River Project Texas.
Bureau of Reclamation.****Sustained in Part—Dismissed in Part.****Contracts: Construction and Operation: Actions of Parties—Contracts: Construction and Operation: Changes and Extras—Contracts: Construction and Operation: General Rules of Construction**

Where the contractor's interpretation of an arguably ambiguous construction contract provision governing variations in internal pipe diameters would largely nullify a limitation on the length of the pipe over which the maximum internal variation of the pipe could extend and where the contractor did not protest the Government's interpretation, but took actions which were only consistent with agreement to or acquiescence in the Government's interpretation, the Board holds that a disagreement with the Government's interpretation first expressed over three months after a problem with internal pipe diameters was brought to the contractor's attention by the rejection of a substantial quantity of pipes was untimely and the contractor's claim for a constructive change based on misinterpretation of the contract was denied.

Contracts: Construction and Operation: Actions of Parties—Contracts:**Construction and Operation: General Rules of Construction**

Where a contract provision prescribed a method for the repair of airholes in gasket bearing areas of concrete pipe and provided that "All other repairs shall be made in accordance with the procedures of Chapter VII of the Sixth Edition of the Bureau of Reclamation Concrete Manual," and the Concrete Manual, in addition to prescribing methods of repair, listed nine defects which were normally repairable and where the evidence established that during contract performance the parties considered the Concrete Manual to control not only methods of repair but also the types of repairable defects, repair of the listed defects was permissible notwithstanding that the contract reference was to "procedures" of the Concrete Manual and the Government's contention that under the dictionary "procedures" and "methods" have the same meaning.

Contracts: Construction and Operation: Changes and Extras—Contracts: Construction and Operation: Drawings and Specifications—Contracts: Construction and Operation: Intent of Parties

Where the Board found that the contracts contemplated that repair of listed defects in accordance with the Concrete Manual was permissible and the Concrete Manual contained a provision providing that "repairs should not be permitted when the imperfections or damage are the result of a continuing failure to take known corrective action," the Board rules that a reasonable interpretation of the quoted provision would permit the denial of otherwise allowable repairs if the defects or damage were attributable to the contractor's continued or prolonged failure to implement measures which the contractor either knows or as a reasonably skilled contractor should know would eliminate or alleviate

the defects. The evidence having established the cause of a particular defect and that the defect occurred in significant numbers of pipes over a substantial period of time, the refusal to permit such defects to be repaired did not constitute a change to the contract. The Government's refusal to permit certain other repairs which the evidence established was based on concern for the integrity of any repair generally rather than the contractor's continuing failure to take known corrective action did constitute a change to the contract.

Contracts: Construction and Operation: Changes and Extras—Contracts: Disputes and Remedies: Burden of Proof

Where the Concrete Manual placed limitations on the repairable area of certain defects and did not limit the repairable area of certain other defects but the evidence established that all such defects were not repairable without regard to magnitude and extent, and the evidence established that repairs normally permitted by the Concrete Manual were not allowed, but evidence of the extent of defects on rejected pipes was lacking, the Board holds that the contractor has failed to carry its burden of proof that pipes were improperly rejected. As to identified pipes which appellant's expert witness testified were repairable in accordance with the Concrete Manual, the Board holds that appellant has established prima facie that the pipes were improperly rejected.

Contracts: Disputes and Remedies: Burden of Proof—Contracts: Performance or Default: Acceptance of Performance—Contracts: Performance or Default: Inspection

Where substantial quantities of pipes which had been accepted were rejected on a subsequent inspection, and the evidence did not establish that the pipes did not conform to contract requirements,

the subsequent rejection of the pipes was improper even though the initial acceptance was not the final acceptance contemplated by the contract and even though it is a general rule that the burden is on the seller to prove that goods rejected prior to acceptance conform to contract requirements. The Board holds that the initial acceptance, in the absence of evidence to the contrary, established that the pipes conformed to the requirements of the contract.

Contracts: Construction and Operation: Changes and Extras—Contracts: Disputes and Remedies: Burden of Proof

Where the Government refused to allow repairs to certain defects permitted by the Concrete Manual prior to conducting hydrostatic tests on the pipes and it appeared that at least some of the pipes would have passed the test and been acceptable if repairs in accordance with the Concrete Manual had been allowed, the Government by its actions has made the evidence unavailable and the Board utilizes a "jury verdict" approach to determine the number of pipes which could have been repaired under the Concrete Manual and made acceptable.

Contracts: Construction and Operation: Changes and Extras—Contracts: Disputes and Remedies: Equitable Adjustments

Where the Government required hydrostatic tests of pipes in excess of those specified by the contracts, the Board rules that the contractor's entitlement to compensation for such tests could properly turn on the results of the tests inasmuch as the Inspection and Acceptance Clause of the General Provisions (Standard Form 23-A, April 1961 Edition) allows the Government at any time before final acceptance of the entire work to request the removal of completed work at the contractor's expense if the work does not conform to contract requirements and for

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an equitable adjustment to the contractor if the work does conform to the contract.

Contracts: Construction and Operation: Changes and Extras—Contracts: Disputes and Remedies: Equitable Adjustments

Where the evidence failed to support the contractor's claim as to the amount of extra repair work and testing required by the Government and the quantity of pipe which was improperly rejected and there was substantial evidence that the contractor had underbid the work and that a significant portion of the contractor's costs in addition to its estimates was due to factors such as unproven or unsuitable machinery and equipment, improper maintenance and inexperienced and unskilled labor, justification for the total cost method of computing an equitable adjustment has not been established. The Board holds that the equitable adjustment due the contractor may properly be computed on the basis of summaries of costs from appellant's books and records, overruling a Government objection to such cost presentation made for the first time on brief that the books and records from which the summaries were prepared were not available at the hearing, since the record revealed that appellant had repeatedly offered to make its records available for audit by the Government prior to the hearing.

Contracts: Construction and Operation: Changes and Extras—Contracts: Disputes and Remedies: Jurisdiction

The Board denied the Government's motions to dismiss as beyond the jurisdiction of the Board, the contractor's claims to be compensated for inefficiency resulting from the interim wrongful rejection of substantial quantities of pipes and for reimbursement of a sum paid to its subcontractor because of the unavailability of pipe for laying which was allegedly attributable to the Government's incorrect interpretation of the contract as to

permissible internal diameters of the pipe. On the merits the latter claim was denied, since Government responsibility for this payment had not been established.

Contracts: Construction and Operation: Changes and Extras—Contracts: Disputes and Remedies: Jurisdiction

A Government motion to dismiss as beyond the jurisdiction of the Board a claim arising out of severe and arbitrary inspection was denied, the Board holding that such a claim was not readily distinguishable from claims based upon the imposition of excessive standards of workmanship which claims are clearly cognizable by the Board as constructive changes. A contractor's claim for lost profits in such circumstances was dismissed as beyond the jurisdiction of the Board since the concept of an equitable adjustment excludes anticipated or unearned profits on work not accomplished.

Contracts: Construction and Operation: Changes and Extras—Contracts: Disputes and Remedies: Equitable Adjustments

A contractor's claim for interest as part of an equitable adjustment was denied where there was no evidence of specific loan transactions or of payments of interest in the record.

APPEARANCES: H. A. Federa, Secretary and Counsel, Cen-Vi-Ro of Texas, Inc., c/o Raymond International, Inc., Houston Texas for the appellant; Henry J. Strand and David J. Askin, Department Counsel, Denver, Colorado, for the Government.

**OPINION BY MR. NISSEN
INTERIOR BOARD OF CONTRACT APPEALS**

These appeals involve claims for constructive changes, which as initially asserted and excepted from

the releases (Exhibits 5A and 81A) total \$3,297,385.05.¹ We have previously ruled on appellant's motion to expunge certain exhibits from the appeal file.² In a prophetic statement Government counsel asserted that the appeals raised "such substantial questions of fact that it is or will be virtually impossible to resolve them adequately." (Second Statement of Position, p. 4.) An extended hearing and prolonged study of the record have convinced us of the accuracy of that assertion.

Contract No. 14-06-D-5028 (Exh. 1) was awarded to Cen-Vi-Ro of Texas, Inc.,³ on November 12, 1963. The contract incorporated Specifications DC-6000 (pertinent portions of which are attached as Appendix "A") and called for the completion of the earthwork, concrete pipe and structures of a portion (approximately 90 miles) of the Main Aqueduct of the Canadian River Project⁴ for an estimated price of \$12,464,227. Cen-Vi-Ro undertook to manufacture the pipe

(principally 54-, 60-, 66- and 72-inch in diameter), and subcontracted laying of the pipe and all other work to R. H. Fulton.

Contract No. 14-06-D-5244 (Exh. 79) was awarded to R. H. Fulton⁵ on August 13, 1964. The contract called for completion of earthwork, concrete pipe and structures of a portion of the Main Aqueduct (Lubbock to Lamesa), Southwest Aqueduct, totaling approximately 140 miles of pipeline, and Pumping Plants Nos. 8, 9, 10 and 11 in accordance with Specifications DC-6130 for an estimated price of \$8,785,519.02. In conformance with the practice of the parties, the contracts will be referred to in this opinion by their specification numbers.

At the time of award of the first contract (DC-6000), Cen-Vi-Ro had no facilities for the manufacture of pipe in the Panhandle of Texas area (Tr. 1982). Cen-Vi-Ro commenced construction of a plant, referred to as the north plant, for the manufacture of reinforced concrete pressure pipe (RCP) at Plainview, Texas, in December 1963 and substantially completed it in May of 1964.⁶ The plant consisted essentially of equipment for the mixing

¹ Claims totaling \$134,750 (\$120,314 of which was applicable to DC-6000), constituting the estimated costs of disposing of disputed rejects, were withdrawn at the hearing (Tr. 987, 993).

² IBCA-718-5-68 and IBCA-755-12-68 (May 28, 1970), 77 L.D. 106, 70-1 BCA par. 8297.

³ The name Cen-Vi-Ro is derived from the centrifugation, vibration, and rotation method of producing concrete pipe (Tr. 18). Cen-Vi-Ro of Texas, Inc., is a wholly-owned subsidiary of Raymond International, Inc., and was formed for the express purpose of bidding on the Canadian River Project (Tr. 5).

⁴ The Canadian River Project involved the construction of a total of 322 miles of pipeline, pumping plants and related facilities for the furnishing of water to 11 cities in the Panhandle of Texas (Tr. 1979). The contracts involved in these appeals are the second and third of four major contracts.

⁵ While the notice of appeal under this contract (Exh. 82) was from Cen-Vi-Ro in the name of R. H. Fulton, the parties have consistently referred to the appeals as those of Cen-Vi-Ro in reliance upon a power of attorney from R. H. Fulton, dated November 24, 1967 (Exh. 76).

⁶ Tr. 1214, 1215. The first steel reinforcing cage was manufactured on May 25, 1964, and the first concrete pipe was spun on May 29, 1964 (Tr. 1380, 1358; Inspectors Daily Reports of May 25 and May 29, 1964, Exh. 44). Reference to Inspectors Daily Reports will be to Exhibit 44 unless otherwise indicated.

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(batching) of concrete and the manufacture of steel reinforcement cages, a 20-foot spinner for the manufacture of 66- and 72-inch diameter pipe referred to as the "gyro" spinner,⁷ a 16-foot spinner for the manufacture of 54- and 60-inch diameter pipe sometimes called the pneumatic spinner,⁸ steam tunnels for curing the pipe, a stripping area where forms were removed from the pipe and facilities for hydrostatic tests (Tr. 1323-1327; Plant Layout, Exh. 75 and Special Report, dated May 21, 1965, Exh. 83).

After receipt of a purchase order (Exh. 81B) from R. H. Fulton for approximately 682,000 feet of concrete pipe in diameters ranging from 18 through 72 inches in accordance with Specifications DC-6130, appellant began construction of a facility for manufacture of 18-through 42-inch pipe referred to as the south plant. In addition to mixing equipment, this facility consisted of a 16-foot spinner for the manufacture of 27- and 42-inch diameter pipe and a 12-foot spinner for the manufacture of 18- through 27-inch diameter pipe together with equipment for prestressing, coating, and wrapping pipe cores, steel reinforcement fabrication and hydro-

static testing.⁹ The south plant for the manufacture of the smaller diameter RCP (42-inch and below) was completed on or about February 1, 1965, and the first NCP pipe core was manufactured on April 2, 1965.¹⁰ Wrapping, testing and coating of NCP pipe cores commenced on June 3, 1965 (Tr. 921; Inspectors Daily Report of June 3, 1965, Exh. 100).

Early Production

Cen-Vi-Ro experienced immediate difficulties with the manufacture of adequate quantities of acceptable reinforcement cages for RCP pipe (Tr. 347). These difficulties principally concerned sizing, spacing of steel within permissible tolerances and workmanship.¹¹ Mr. Kenneth Thomas, chief of plant pipe inspection for the Bureau, testified that cages were probably one of the greatest causes of delay in

⁹ Exhibits 75 and 83. A proposed construction production schedule, dated August 7, 1964 (Exh. 81P), reflects that 261,586 foot of pipe for DC-6130 was to be NCP (noneylinder prestress) pipe while the balance was to be RCP pipe. RCP pipe was for heads not to exceed 125 feet (paragraph 77.b., Specifications DC-6130). NCP concrete pipe consisted of a core containing prestressed longitudinal reinforcing rods, wires or strands which was helically wound with steel wire under high tension and a mortar encasement (Subparagraphs 79.e and g., Specifications DC-6130).

¹⁰ Tr. 920, 921; Franklin memoranda dated February 1 and March 3, 1965, Cen-Vi-Ro Correspondence, Exh. 120; Inspectors Daily Report of February 1, 1965, Exh. 100. Exhibit 120 was obtained by the Government on discovery and stipulated into evidence (Tr. 639). References to this exhibit hereinafter will be to "Cen-Vi-Ro Correspondence."

¹¹ Tr. 1335-1347; see, among others, Inspectors Daily Reports of June 19 and 22, July 1, 8, 15, 20 and 31, August 3, 5, 6, 19, 24, and 31, 1964.

⁷ In the "gyro" spinner, the rotating force was applied to the form by steel wheels tracking in rings which encircled the form at points equidistant from the ends (Tr. 1330-1332, 1356; Photos B, F and G attached to Government's Statement of Position, IBCA-718-5-68).

⁸ In this spinner the rotating force is applied to the form by rubber-tired drive wheels (see references note 7, *supra*).

production (Tr. 1349). Mr. M. J. Franklin, appellant's resident project manager until May of 1965, admitted that cage manufacture problems were partially attributable to a machine that was not suitable (Tr. 557, 58). While Cen-Vi-Ro continued to have problems with cages throughout the period of pipe manufacture, these difficulties were largely resolved by January 1965, through the replacement of the foreman for cage manufacture and the addition of a second mandrel-type cage machine (Tr. 1342, 1345-1347).

Cen-Vi-Ro also experienced numerous difficulties in the manufacture of acceptable pipe. Among the difficulties was so-called "gyro area" concrete in pipes manufactured on the 20-foot spinning machine (Tr. 472, 1847). This concrete had a different color or texture and appeared on the pipes at points where the gyro rings encircled the forms on which the pipes were made (Tr. 98, 1847). The Bureau took the position that this concrete was unconsolidated or porous and did not comply with the specifications. Other difficulties encountered by Cen-Vi-Ro included fallouts—segments of concrete pulling or falling away from the reinforcing steel (Tr. 1366, 1854, 1858); rocky bells—exposed aggregates in bell areas (Tr. 579, 1364; Exh. 5M, p. B4); longitudinal and circumferential cracks (Tr. 1875-1877; Exh. 69); unconsolidated concrete in barrel and spigot areas and cracking and flaking interiors. It should be emphasized that there is no such thing as "zero defects" in

concrete pipe. In the words of Cen-Vi-Ro's expert witness, Mr. Howard Peckworth, "it is impossible for any pipe man to build a perfect piece of [concrete] pipe." (Tr. 79, 210.)

While Cen-Vi-Ro brought some experienced personnel, *i.e.*, machine operators and supervisory personnel, from California (Tr. 348, 499), it relied principally on the surrounding area for its supply of labor (Tr. 503-505). Mr. Franklin admitted that many of these people were inexperienced in industrial, production or construction work and that he did have problems with inexperienced personnel (Tr. 511). He also admitted that labor was a contributing cause of defects and that there was a substantial turnover in the work force, but stated that Cen-Vi-Ro paid prevailing wages and denied that this turnover was attributable to low pay.¹² There is evidence that Cen-Vi-Ro's management attributed its difficulties, at least, in part, to inexperienced and unqualified labor (Tr. 521, 788; Murray memorandum, dated July 8, 1965, Cen-Vi-Ro Correspondence; Travel Report of R. C. Borden, dated June 9, 1965, Exh. 23; Notes on Meeting of July 24, 1965, Exh. 24). See also undated statement of

¹² Tr. 519, 520, 521. Mr. Mike Herrera, production manager, from July 10, 1965, until the completion of pipe production in June of 1966, confirmed that there was a high turnover of personnel and that it was excessive at the start of the job (Tr. 789). Although Mr. Herrera was not assigned permanently to the Cen-Vi-Ro plant until May of 1965 the record reflects that he made frequent, extended visits to the plant as an adviser and was present in June, July, August, September and October, 1964 and in February 1965 (Tr. 690, 755; Inspectors Daily Reports).

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Robert L. Dragoo (Exh. 39) concerning Cen-Vi-Ro's difficulty in obtaining qualified personnel at the compensation offered. Mr. Dragoo confirmed the accuracy of his statement at the hearing (Tr. 1206, 1207).

Suspension of Pipe Laying Operations

Cen-Vi-Ro's original construction program, dated April 13, 1964 (Exh. 77), contemplated that laying of pipe for Specifications DC-6000 would commence on August 1, 1964.¹³ At a meeting on October 28, 1964, attended by representatives of the Bureau, Cen-Vi-Ro and R. H. Fulton, Cen-Vi-Ro conceded that overestimation of the capabilities of the 20-foot spinner and other pipe manufacturing problems made the original schedule impossible to meet.¹⁴ Among the measures to improve pipe production discussed at the meeting was rebuilding the 20-foot spinner,¹⁵ the installation of an

additional 16-foot spinner, the procurement of additional forms and hydrostatic testing equipment,¹⁶ the addition of two key supervisory personnel and the hiring and training of additional pipe repairmen. Cen-Vi-Ro presented a revised pipe laying schedule, dated September 28, 1964 (note 14, *supra*), which contemplated a suspension of pipe laying operations for the period November 3, 1964, until February 1, 1965, in order that sufficient quantities of acceptable pipe could be manufactured to assure economical laying operations. Representatives of R. H. Fulton pointed out that the proposed suspension represented minimum down time and proposed that pipe laying operations be discontinued in mid-November 1964, and resume May 1, 1965 (letter dated October 30, 1964, note 14, *supra*). Pipe laying operations were discontinued on November 21, 1964, and resumed on May 10, 1965 (Tr. 1843). The suspension necessarily reduced Cen-Vi-Ro's revenue¹⁷ and

¹³ Tr. 1841. In fact, the subcontractor, R. H. Fulton, did not commence laying operations (66" pipe) until September 2, 1964 (Tr. 1841; Inspectors Daily Report, dated August 27, 1964). By September 21, 1964, the supply of 66-inch pipe had been exhausted and R. H. Fulton skipped a section of the line and commenced laying 54-inch and 60-inch pipe (Tr. 1842).

¹⁴ Letter, dated October 30, 1964, Exh. 9. These statements are attributed to Mr. S. R. "Duke" Hubbard, vice president and general manager of Cen-Vi-Ro (Tr. 1095). The Board finds that the letter accurately reflects events at the meeting (Tr. 563, 677, 1844).

¹⁵ Mr. Franklin testified that the gyro spinner was essentially out of production from September 1, 1964, to January 1, 1965, for modifications and machining of forms which were sent to Fort Worth and Los Angeles (Tr. 559). A total of 760 pipes had been produced on this spinner by November 16, 1964

(Tr. 1862). While the gyro spinner had previously been used for the manufacture of 32 miles of 87-inch X 40-foot pipe for the East Bay Municipal Utility District (Oakland, California), this was not RCP pipe (Tr. 565, 566, 595). Mr. Franklin expressed the opinion that the machine was capable of producing good quality pipe under proper supervision, i.e., skilled operators (Tr. 614).

¹⁶ Mr. Franklin stated that production during this period was sometimes curtailed awaiting additional forms (Tr. 562). This testimony is confirmed by a memorandum from the resident engineer dated October 22, 1964 (Exh. 8) and Inspectors Daily Reports, dated August 3, September 11, 21 and 26, and October 16, 19, and 20, 1964.

¹⁷ It appears that Cen-Vi-Ro received approximately 60% (less 10% retainage) of a pay item for pipe accepted but not laid (Franklin memoranda of March 1 and May 1, 1965, Cen-Vi-Ro Correspondence).

resulted in Cen-Vi-Ro carrying a large pipe inventory for the suspension period.

Under date of September 23, 1965, Cen-Vi-Ro and R. H. Fulton entered into amendments of Cen-Vi-Ro Purchase Order No. 10 to R. H. Fulton under Specifications DC-6000 and R. H. Fulton Purchase Order No. 1050 to Cen-Vi-Ro under specifications DC-6130 (Exhs. 25, 81F; see also Cen-Vi-Ro Correspondence). The amendments provided for the revision of the existing production construction schedules so as to complete the Bureau contracts on or before March 1, 1967, for the waiver by R. H. Fulton of all claims against Cen-Vi-Ro based on prior schedules and commitments, for the substitution of pretensioned pipe manufactured by Gifford-Hill-American in lieu of NCP high head pipe manufactured by Cen-Vi-Ro for Specifications DC-6130 and for a lump-sum payment of \$100,000 to R. H. Fulton.¹⁸ Cen-Vi-Ro's claim for reimbursement of this sum is considered *infra*.

Specifications DC-6130

As we have previously noted Cen-Vi-Ro, as subcontractor to R. H. Fulton under Specifications DC-6130, completed a facility (south plant) for the manufacture of RCP pipe in diameters of 42-inch and below on or about February 1, 1965 (note 10, *supra*). RCP pipe in diameters below 54 inch for Specifica-

tions DC-6000, were manufactured in the south plant. As in the north plant, Cen-Vi-Ro experienced difficulties in manufacturing cages having cover and spacing of steel within permissible tolerances (Inspectors Daily Reports, dated February 1, 3, 4, 11, 18, 26, and 27, 1965, Exh. 100). Some pipes had defects such as fallouts, rocky bells, circumferential and longitudinal cracks and broken and cracked spigots. (Inspectors Daily Reports, dated February 11, 12, 13, 19, 22, 24, 26, and 27; April 1, 2, 7, 15, 19, 23, and 29, 1965, Exh. 100.) A total of 188 RCP pipe units, sizes 42 inches and below, were rejected for all causes prior to May 15, 1965.¹⁹

Cen-Vi-Ro experienced difficulties manufacturing high head NCP pipes that would successfully pass the hydrostatic tests.²⁰ Some of these pipes were downgraded, *i.e.*, they were accepted at a lower head than for which they were designed.²¹ Mr. Murray, Cen-Vi-Ro's production

¹⁸ Exh. 94. Mr. W. B. Murray testified that in addition to problems encountered on DC-6000, the south plant had insufficient floor space in stripping and spinning areas (Tr. 918). See also the memorandum written by Mr. Murray, dated July 8, 1965 (Cen-Vi-Ro Correspondence).

¹⁹ Tr. 925, 926; Inspectors Daily Reports, dated June 3, 10, 11, 15, 21, and 25, 1965, Exh. 100. The specifications required each unit of NCP pipe to be tested and to withstand a pressure of 125% of the design head for four minutes without cracking and without leakage appearing on the exterior surface (Subparagraph 79.i.(2), Specifications DC-6130).

²⁰ Tr. 930, 931; Murray memorandum, dated July 8, 1965, note 19, *supra*. Cen-Vi-Ro manufactured only 865 NCP pipe units (Exh. 93). Exhibit 81W reflects that of a total of 590 pipe units designed for heads of 150 to 250 feet, 310 were downgraded due to hydrostatic test failures at the design head.

²¹ Mr. Franklin testified that the \$100,000 payment was to settle a claim by R. H. Fulton of twice that sum (Tr. 381, 382).

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manager for the period January to July of 1965, testified that the process of making NCP pipes was new, and was more complicated and more sophisticated than the process of making RCP pipes (Tr. 924).

At the time of his replacement as production manager by Mr. Herrera in July of 1965, Mr. Murray wrote a memorandum detailing the difficulties in producing NCP pipes and recommending that all NCP pipes with heads above 150 foot be subcontracted or "farmed out" (note 19, *supra*). Mr. Murray was of the opinion that Cen-Vi-Ro could not produce the high head NCP pipe economically and that substitute pipe could be purchased from other sources at a lower cost (Tr. 932). As we have already noted, Cen-Vi-Ro subcontracted the manufacture of a large quantity of pipe to Gifford-Hill-American, substituting pretensioned concrete pipe for NCP (Exhs. 25 and 81F).

The May 13 Letter and The May 15, 1965, Inventory

Mr. C. O. Crane, the project construction engineer for the Bureau, hereinafter "project engineer," testified that he became concerned about the large number of pipes with flaking interiors and other defects manufactured by Cen-Vi-Ro in the early months of 1965 (Tr. 1994, 1995). He stated he considered that a state of emergency was developing and that he requested Mr. Frank Rippon of the Chief Engineer's Office to visit the project and, *inter*

alia, review pipe manufacturing problems.²² Mr. Rippon's visit to the Cen-Vi-Ro plant was followed by that of Mr. R. C. Borden, Bureau liaison engineer, during the period April 20-23, 1965. Mr. Borden testified that upon his return to Denver a determination was made to furnish guidelines to the project as to the scope of permissible repairs, such as the size of fallouts and rock pockets which could be repaired.²³

Under date of May 13, 1965, the project engineer²⁴ addressed a letter²⁵ to Cen-Vi-Ro, reading as follows:

²² Tr. 1998. Mr. Rippon made a visit to the Cen-Vi-Ro plant during the period March 15-17, 1965 (Travel Report, dated September 13, 1965, Exh. 138). He concluded that pipe manufacturing problems were attributable to a lack of quality control and that a detailed investigation was required in order to determine proper corrective measures.

²³ Tr. 1707. These determinations and others were furnished the project by a telegram from the Chief Engineer dated May 12, 1965. The telegram is referred to in Mr. Borden's Travel Reports, dated May 18, and June 9, 1965 (Exhs. 20 and 23), and has been furnished pursuant to the Board's call of August 18, 1971.

²⁴ Mr. Crane, as justification for the letter, testified that while it appeared now that the quality of the pipe was improving, there was no way of telling whether the defect rate of pipes produced in the last two weeks of April had improved (Tr. 2001, 2071), as alleged by Cen-Vi-Ro (Exh. 5L, pp. 4 and 7; Production Quality Graph). We have considerable difficulty accepting this testimony since it apparently rests on the assumption that Cen-Vi-Ro had thousands of pipes in inventory which had been neither inspected nor tested by the Bureau. As we find *infra* (note 59), this assumption is not in accordance with the facts. The Bureau apparently had no difficulty in concluding that a good grade of pipe was being produced after May 10, 1965 (see page 9 of Special Report, dated May 21, 1965, Exh. 83).

²⁵ Exh. 5E; Exh. 5N, pp. 12 and 13. An identical letter was addressed to R. H. Fulton under Specifications DC-6130 (Exh. 81C).

The importance of the Canadian River Project Aqueduct and the exacting performance that will be required in delivery of municipal water on a continuing and uninterrupted basis make it imperative that only first quality pipe be used in its construction.

Your Plainview plant, manufacturing pipe for this Project, has continued daily since work was initiated to produce some questionable and unacceptable pipe with many sections leaking so badly they have failed to pass the hydrostatic tests.

The specifications, by reference to the concrete manual, state that repairs to concrete pipe shall not be permitted when imperfections or damages are the result of continuing failure of the contractor to eliminate cause (sic) of imperfections or damages. You are expected, under your contract, to exercise quality control in the manufacturing processes and to exercise care in handling of pipe at all times to produce a quality product.

Since corrective measures to eliminate causes of imperfections have not been accomplished at this date, and since pipe units which leak under hydrostatic tests continue to be produced, I find it necessary to invoke the following requirements:

1. Pipe sections with large fallouts on the interior surfaces will be rejected, and only those pipe with fallouts of approximately one square foot or less are acceptable for repair.

2. All pipe with scaling or loose and weak interior surface material will be rejected.

3. Experience has been that extensive repair to bells and spigots has impaired the function of joints. Pipe having imperfections or damaged areas that extend over six inches of gasket area in the bell or four inches in the spigot will be rejected. Any repairs to gasket areas shall be made against precise forms and dimensions accurately checked to assure that pipe is installed with joints within the approved tolerances.

4. Extensive repairs to rock pockets in bells and lack of consolidation of the

concrete that will result in poor bond between the concrete and the steel will not be permitted.

5. All pipe having transverse (circumferential) cracks that extend through wall of pipe will be rejected. The possibility of these cracks opening further due to beam action from handling and back-fill loads is too great to allow use of such pipe.

6. Pipe cracked longitudinally for substantially the full length will be rejected. All pipe containing shorter longitudinal cracks must be hydrostatically tested. Pipe failing to withstand the required test pressure for 20 minutes without leakage or showing evidence of extension of cracks under pressure will be rejected.

7. Failure to observe specifications requirements in respect to saturated steam curing will be cause for rejection of all pipe in the steam curing chamber.

8. Any other defects shall be judged conformably with above.

9. All permissible repairs will be made promptly and within a few days after the pipe is manufactured.

The above requirements apply to pipe that has been manufactured and/or repaired as well as newly manufactured pipe.

The letter was hand-carried to Cen-Vi-Ro by Mr. Vern Grantham, assistant project engineer, on May 13, 1965.²⁶ On May 14, 1965, an inspection of pipes in the yard, including pipes previously accepted, in accordance with criteria in the May 13 letter was begun (Tr. 1519; Inspectors Daily Report, dated

²⁶ Tr. 2003. However, the criteria for repair of fallouts (only those of one square foot or less were repairable) and rocky bells (only those of 6-inches or less in gasket areas were repairable), were applied prior to the May 13 letter (Inspectors Daily Report, dated April 30, 1965). See also Tentative Instructions to Concrete Inspectors, dated May 7, 1965, furnished in response to the Board's call of August 18, 1971.

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May 13, 1965). This inspection will be referred to as the "May 15 inventory." At this time there were between 12,000 and 13,000 pipes in the yard for the two contracts (Tr. 846, 1515, 1516, 1714). The inventory of pipes under DC-6000 was completed prior to May 21, 1965 (page 3 of Special Report, note 24, *supra*). However, see tabulation entitled "Change of Inventory Status as of 5-16-65" attached to memorandum, dated May 27, 1965.²⁷ During this inventory, 2,877 pipes (54- through 72-inch) were rejected under DC-6000, and 337 pipes (18- through 27-inch) were rejected under DC-6130.²⁸

On May 24, 1965, the resident engineer issued a memorandum (Exh. 5N, p. 17) which stated:

In accordance with requirements set forth in letter dated May 13, 1965, from Project Construction Engineer to Cen-Vi-Ro of Texas, Inc., and R. H. Fulton, Contractor, the following will govern the acceptance of pipe after hydrostatic tests:

1. Pipe cracked longitudinally for substantially less than the pipe length²⁹ must

²⁷ Exh. 22. The tabulation bears the initials "LWL," presumably Leigh W. Lloyd of Cen-Vi-Ro, and the date "May 25, 1965."

²⁸ Tabulation, dated April 18, 1967, Exh. 60, and undated tabulation, Exh. 94. The total of 2,877 pipes rejected under DC-6000 does not include 404 pipes marked for special hydro on that date (tabulation dated May 25, 1965, note 27, *supra*). The tabulation dated April 18, 1967, states "Supersedes previous tabulations."

²⁹ "Substantially less than the pipe length" does not appear to have been clearly defined until the chief plant inspector's memorandum of March 31, 1966 (Exh. 5N, pp. 32, 33) which appears to be limited to reclaims and which after referring to Cen-Vi-Ro's contention that pipes which dripped on the test stand would heal within seven days and to an amendment to Subparagraph 67.j.(2) effected by the Chief

be hydrostatic (sic) tested before any repairs are made to the crack. Pipe failing to withstand the required test pressure for 20 minutes without leakage or showing evidence of extension of cracks will be rejected. Pipe passing the required test pressure will be accepted without additional repairs.

2. Short longitudinal cracks which were repaired prior to May 13, 1965, and not hydrostatic (sic) tested, may be hydrostatic tested without additional repair work. The pipe will be rejected if it fails to pass the required test.

3. Circumferential cracks which appear only on outside of pipe should be hydrostatic (sic) tested before repairs, to determine if crack extends through the pipe wall. The pipe will be rejected if it fails to pass the required test. Pipe that pass the test without leakage or extension of the crack may be accepted without repairs.

4. Grout leakage at seams may be repaired before tests are made if cracks are not evident after all defective concrete is removed. The repaired pipe will be rejected if it fails to pass the required test.

5. Drummy areas of poor consolidation similar to those appearing at gyro ring areas may be repaired prior to testing only if the drummy concrete can be removed by shallow excavation. All other pipe showing evidence of poor consolidation of concrete will be tested without re-

Engineer's letter of January 20, 1965, provides in pertinent part as follows:

"The following defects are a basis for rejection regardless of whether it (sic) leaks, or not:

"1. Pipe with longitudinal cracks over 1/2" the length of pipe.

"2. Pipe with more than 1 crack if cracks are over 4' in length.

"3. Shorter longit. cracks which extend under pressure.

"4. Completely unconsolidated gyro areas.

"5. Cr. cracks in spigot or barrel which appear on inside and outside of pipe wall.

"6. Pipe with more than 2 core holes repaired. Pipe with 2 repaired core holes are acceptable if they pass hydro. provided cores are not within 6 feet of each other."

pairs and rejected if dripping occurs under required test pressure and will not heal within 7 days.

The Reclaim Program

The process of reinspecting, repairing, testing, and securing the Bureau's acceptance of pipes rejected during the May 15 inventory is referred to as the reclaim program. The reclaim program did not commence until on or about the first week in August 1965 (Tr. 1424, 1522; Inspectors Daily Reports, dated August 3 and August 9, 1965). However, only eight pipes are listed as reclaims prior to September of 1965 (Summary of Pipe Units Reclaimed, Exh. 146). This process continued until the completion of pipe manufacture in June of 1966 (Exh. 5L). Of the 2,877 pipe units under Specifications DC-6000 rejected during the May 15 inventory, at least 2,260 pipes, including 1,920 rejected for scaling or flaking interiors, were later accepted or reclaimed (App's Exh. C). However, the above number of reclaims does not include 150 pipes rejected for fallouts and 233 pipes rejected for rocky bells during the May 15 inventory which were subsequently accepted. The majority of the reclaimed pipes were accepted during the period July through December (1,032 were accepted during September) 1965 (Exh. 146).

Production After May 15, 1965

After May 15, 1965, Cen-Vi-Ro experienced an improved rate of production and a reduced rate of

rejects. Cen-Vi-Ro produced a total of 30,133³⁰ pipe units under DC-6000 of which 10,641 were manufactured prior to May 15, 1965, and 19,492 from May 15, 1965, until the cessation of production in June of 1966 (Exh. 5Q). Final rejects totaled 1,845 or approximately 6.12 percent, of which 1,250 were manufactured prior to May 15, 1965. Under Specifications DC-6130, Cen-Vi-Ro produced 25,586 pipe units (RCP, 18", 21", 24" and 27" diameter) of which 5,898 were manufactured prior to May 15, and 19,688 were produced after May 15, 1965.³¹ Final rejects of RCP under DC-6130 totaled 1,078 of which 319 were manufactured prior to May 15 and 759 after that date.³²

Cen-Vi-Ro originally contemplated completing pipe production under both contracts in September 1966 (Exhs. 77 and 81P). Pipe manufacture was actually completed on June 16, 1966, or approximately 2½ months earlier than planned (Tr. 1846).

Cen-Vi-Ro's Claims

In a meeting with Bureau representatives on May 20, 1965, Cen-Vi-Ro placed the Bureau on notice that

³⁰ Includes 54" and 72" pipes manufactured in the north plant for Specifications DC-6130 (Tr. 1627 and 1630).

³¹ Exh. 81R. This tabulation includes 170 special 8-foot length pipes while the Comparison of Rejected Pipe Remaining in Yard July 1966 to Total Production (Exh. 81Q) excludes such pipes.

³² Exh. 81R. There appears to be a transposition of figures on this exhibit since rejects of 27-inch pipes prior to May 15, 1965, are totaled as seven when the correct total is nine and rejects after May 15 are totaled as 323 when the correct total is 321.

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it considered that the May 13 letter rewrote the specifications and would increase contract costs by 25 percent (memorandum, dated May 21, 1965, Exh. 21). Bureau representatives stated that the basic purpose of the letter was to assure that only quality pipe be installed in the line under both contracts. By letter dated June 10, 1965 (Exh. 5G), Cen-Vi-Ro commented on each requirement of the May 13 letter and stated that it was preparing a claim which would include additional manufacturing costs incurred by the changes, costs of pipes previously manufactured and accepted but now rejected and additional costs to the pipe-laying subcontractor because of unavailability of pipes which had been previously accepted. Cen-Vi-Ro reiterated its contention that the May 13 letter effected changes to the specifications in a formal statement of position, dated August 9, 1966 (Exh. 5L), which included allegations that neither the contract nor the bid papers placed the contractor on notice that certain pipes must pass hydrostatic tests prior to repair, that certain repaired pipes could not be accepted and that pipes must be of such quality that the line could not be closed during the 3-year maintenance warranty period for repairs.³³ Cen-Vi-Ro submitted its formal

claim for additional compensation in the amount of \$2,267,868, exclusive of a claim for surplus cages, under date of October 13, 1966 (Exh. 5M). The items constituting alleged changes will be taken up in the order in which they were treated in the contracting officer's Findings of Fact and Decision of March 26, 1968 (Exh. 5).

Applicability of the Concrete Manual

Cen-Vi-Ro's position that the May 13 letter effected changes to the specifications is based primarily upon the contention that the contracts expressly incorporated the provisions of the Bureau of Reclamation Concrete Manual³⁴ as to permissible repairs.

Cen-Vi-Ro relies upon Subparagraph 67.j.(2), Specifications DC-6000:

Individual airholes in gasket bearing areas of precast-concrete pipe may be filled with a hand-placed, stiff, pre-shrunk 1:1 mortar of cement and fine sand with no other preparation than thorough washing with water. Such fillings shall be kept moist under wet burlap for at least 48 hours or steam cured as required in Subparagraph e.(4)(a) for a minimum 12 hours. *All other repairs shall be made in accordance with the procedures of Chapter VII of the Sixth Edition of the Bureau of Reclamation Concrete Manual.*³⁵ (Italics supplied)

³³ The latter contention is based on the opening statement of the May 13 letter which refers to the requirement for the delivery of municipal water on a continuing and uninterrupted basis. However, the evidence reflects that Cen-Vi-Ro was permitted to break the line for repairs during the warranty period (Tr. 608, 1726, 1727).

³⁴ Sixth Edition, Exh. 45, as to DC-6000 and Seventh Edition, Exh. 117, as to DC-6130. Section 137 of Chapter VII of the Sixth Edition, is set forth in Appendix "B".

³⁵ Except that the reference is to the Seventh Edition of the Concrete Manual, an identical provision is contained in Subparagraph 77.j.(2), Specifications DC-6130.

It should be emphasized that the Concrete Manual is also referred to in Subparagraph 67.e.(1) of the specifications concerning mixing time and compressive strength tests. Section 137 of Chapter VII of the Sixth Edition of the Concrete Manual provides in part:

137. Procedure for Repair of Precast Concrete Pipe—(a) General.—

* * * * *

Most imperfections in and damage to precast concrete pipe, such as inadvertent or occasional imperfections or damage that occurs during normal operations, can be repaired and the pipe made acceptable. But repairs should not be permitted where the imperfections or damage are the result of continuing failure to take known corrective action to eliminate the cause of the imperfections or damage. Imperfections and damage that can normally be repaired are:

- (1) Rock pockets.
 - (2) Exposed steel on the outside of any size pipe and on the inside of pipe 36 inches or larger in diameter.
 - (3) Roughness due to form-joint leakage.
 - (4) Broken bells containing circumferential reinforcement.
 - (5) Impact damage over less than 45° of circumference except for spigots.
 - (6) Fractures or cracks passing through the shell.
 - (7) Out-of-round bells, if not so far out of round that reinforcement steel will be exposed after repair.
 - (8) Spalled shoulders on spigots for support of rubber gaskets.
 - (9) Air holes and roughness in the gasket bearing surfaces of bells and spigots.
- Imperfections and damage that cannot normally be repaired are:

- (1) Spigots or bells that are out of round or are off center to the extent that reinforcement would be exposed after the repair.
- (2) Spun pipe out of limits for diameter because of an excess or deficiency of

concrete having been placed in the form.

(3) Porous, unconsolidated spigots in dry-tamped pipe.

(4) Exposed steel inside of pipe smaller than 36 inches in diameter.

Repairs should not be permitted on pipe damaged by impact when the damaged area covers more than 45° of the pipe circumference. Also, repairs should not be permitted on gasketed spigots if the break is entirely through the shell and into or beyond the area of gasket bearing and extends more than 4 inches around the circumference under the gasket. Pipe that is imperfect or damaged beyond repair on one end can frequently be cut and the good end used at structure connections.

(b) Methods of Repair * * * *

The Government asserts that the Concrete Manual covers how repairs are to be accomplished but not what can be repaired.³⁷ In other words, the Government's position is that after the Bureau, in its discretion, determined that a specific pipe could be repaired, then and only then did the Concrete Manual come into play in determining how the repair was to be effected.³⁸ Cen-Vi-Ro points

³⁶ Section 141 of Chapter VII of the Seventh Edition contains identical provisions as to imperfections and damage that normally can and cannot be repaired. However, the section contains additional provisions that imperfections should be detected and the causes corrected as early as possible in the manufacturing process and repairs effected immediately. The section also limits repairs of prestress pipes to defects that do not involve structural adequacy.

³⁷ Statement of Position, IBCA-718-5-68, pp. 21-26; Brief p. 104, *et seq.*

³⁸ The following provision of Paragraph 72, Specifications DC-6130, arguably supports the Government's position:

"* * * Any unit of pipe that, in the opinion of the contracting officer, is damaged beyond repair by the contractor in hauling, handling, unloading, storing, or otherwise shall be removed from the site of the work and replaced by and at the expense of the contractor with another unit reinforced

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out that had the Bureau intended to limit application of the Concrete Manual to the method of repair it would have referred only to Subsection (b) entitled "Methods of Repair" of Section 137.³⁹ The Government's answer to this contention is that the reference in the contracts to the Concrete Manual is to "procedures" and that procedures and methods are synonymous. We find little merit in this argument since Section 137 of Chapter VII of the Concrete Manual is entitled "Procedure for Repair of Precast Concrete Pipe" and it is highly probable that this explains the reference to procedures in the contracts. While it is true that the dictionary affords support for the Government's position, it is well settled that the dictionary is not the sole or final source of inquiry as to the meaning of a contractual provision.⁴⁰

The Government's principal contention is that the reference to repair

to withstand the same or greater head and loading requirements. Repairs in concrete pipe, when allowed, shall be made in accordance with the provisions of Chapter VII of the Seventh Edition of the Bureau of Reclamation Concrete Manual." While it might be argued that "when allowed" refers to the Concrete Manual as well as the specifications, the term does not appear to serve any useful purpose under such a construction. It is, of course, clear that this provision contemplates repairs to pipes in addition to air holes. No comparable provision appears in Specifications DC-6000.

³⁹ Page 4 of Notice of Appeal, dated May 3, 1968, Exh. 6.

⁴⁰ *Paschen Contractors, Inc. v. United States*, 190 Ct. Cl. 177 (1969). Cf. *United States v. Lennox Metal Mfg. Co.*, 225 F.2d 302 (2d Cir., 1955) (word "may" in partial payments clause did not confer unfettered discretion on contracting officer in making payments to contractor).

of air holes in the specifications is unnecessary and redundant if the provisions of the Manual as to what type of defect can be repaired are incorporated into the contracts as contended by Cen-Vi-Ro. We have examined Section 137 of the Sixth Edition of the Concrete Manual and find nothing which specifically describes a method for repair of air holes.⁴¹ Accordingly, we think it evident that the reference to air holes⁴² in Specifications DC-6000 was to establish a simplified method for their repair and to remove any doubts that the elaborate provisions of the Manual as to preparations for repair (removal of unsound concrete, sand blasting, scrubbing) and cure (repairs at joints to be cured under wet burlap for seven days) are inapplicable. Viewed thusly, the specification method for the repair of air holes is at variance with the methods of repair in the Manual and the sentence following that all other repairs shall be made in accordance with the Manual is eminently logical.

Another very important consideration is the conduct of the par-

⁴¹ Section 141 of the Seventh Edition contains a provision describing a permissible method for the repair of air holes which is identical to that quoted above from the specifications.

⁴² We recognize that the provisions of Subparagraph 67.h.(4)(g), DC-6000 (77.h.(4)(g), DC-6130), providing that "The surfaces of bell and spigot in contact with the gasket and adjacent surfaces that may come in contact with the gasket within a joint movement range of three-fourths inch, shall be free of airholes, * * * or other defects, except that individual air holes may be repaired * * *" implies that no other repairs to gasket areas of bells or spigots are permissible.

ties prior to any dispute.⁴³ First and foremost, the May 13 letter from the project engineer stated that the specifications, by reference to the Concrete Manual, prohibited repairs to concrete pipe when the imperfections were the result of continuing failure of the contractor to eliminate causes of imperfections or damage.⁴⁴ That this was also the view of the contracting officer is established by his telegram of May 12, 1965, to the project engineer (furnished in response to the Board's call of August 18, 1971), which resulted in the May 13 letter. Secondly, contemporaneous documents clearly reflect that prior to the May 13 letter the parties operated on the premise that whether repairs to specific pipes were permissible was governed by the Concrete Manual.⁴⁵ Thirdly, Messrs. Franklin, Herrera and Murray all testified that the Concrete Manual was used as the basis for determining what pipes could be repaired (Tr. 435, 753, 883). Fourthly, Mr. Rippon, who wrote the

specifications at least in part, conceded that it was his intent that repairs were to be permitted in accordance with the Concrete Manual.⁴⁶ In view of this evidence, we find that the testimony of the chief plant inspector, the resident engineer, and the project engineer that the Concrete Manual was only a guide (Tr. 1485, 1955-1956, 2084) does not accurately depict the practice of the parties.

We find therefore that the contracts contemplated that repairs in accordance with the Concrete Manual were permissible. Remaining to be determined is the effect of this finding. The Government asserts that even if the Concrete Manual is elevated to the status of a contractual document, the Manual permits the repair of only occasional imperfections and damage. However, appellant points out (Brief, pp. 6 and 7) and we think correctly, that the Government's emphasis on the word "occasional" results from an inaccurate reading of the Manual. The fact is that the Manual provides:

Most imperfections in and damage to precast concrete pipe, * * *, can be repaired and the pipe made acceptable.

The clause "such as inadvertent or occasional imperfections or damage that occurs during normal operations" which we have omitted from the quoted sentence is in our view merely illustrative and not restric-

⁴³ It is, of course, well settled that the interpretation placed upon a contract provision by the parties is entitled to great weight in determining its meaning. *Hydromatics, Inc.*, ASBCA No. 12137 (October 20, 1969), 69-2 BCA par. 7962; *Compec* (a Joint Venture), IBCA-573-6-66 (January 4, 1968), 75 I.D. 1, 68-1 BCA par. 6776 and cases cited.

⁴⁴ Appellant points out that this quotation is inaccurate inasmuch as it eliminated the phrase "known corrective action."

⁴⁵ See Inspectors Daily Reports, dated January 1 and 8, and April 16, 1965; see also Pipe Rejection Certifications, dated December 2, 8, 21, 23, 24, and 31, 1964, and March 31, April 6, 16 and 23, 1965 (App's Exh. E; Exh. 121). In addition, see the reference to "known corrective action" in the assistant project engineer's memorandum, dated February 18, 1965 (Exh. 15).

⁴⁶ Tr. 1771, 1772. See also statement of Mr. Ryland at the meeting of July 24, 1965, to the effect that repairs as outlined in the Concrete Manual were to be permitted on only occasional imperfect pipe (p. 5, Notes on Meeting, Exh. 24).

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tive of the frequency of repairs.⁴⁷ Our view is strengthened by the fact that the Manual lists nine types of defects which can normally be repaired (only four which normally cannot be repaired) and by the next sentence which does constitute a restriction on the frequency of repairs:

But repairs should not be permitted when the imperfections or damage are the result of continuing failure to take known corrective action to eliminate the cause of the imperfections or damage.

We must determine whether the May 13 letter or Bureau practice⁴⁸ differed from the Concrete Manual as to the extent of permissible repairs and if so, whether the imperfections were the result of Cen-Vi-Ro's continuing failure to take known corrective action. The contrasting views of the parties on the first of these questions are illustrated by the Comparison of Pipe Acceptance Guidelines (Exh. 116)

⁴⁷ If it was intended otherwise the sentence could easily have been modified to make the intention clear, e.g., "Inadvertent or occasional imperfections or damage that occur during normal operations can be repaired and the pipe made acceptable." Cf. The language concerning repairs in ASTM Standard Specifications for Concrete Sewer, Storm Drain, and Culvert Pipe (C14) and ASTM Tentative Specifications for Reinforced Concrete Culvert, Storm Drain, and Sewer Pipe (C76), contained in Appendix of Concrete Pipe Handbook (Exh. 102), which clearly contemplate repairs made necessary by occasional imperfections in manufacture or accidental injury in handling. See also the language in the Bureau's Standard Specifications for RCP Pipe, dated February 1, 1969 (App's Exh. Q), which leaves no doubt repairs are limited to occasional imperfections or accidental damage.

⁴⁸ See Inspectors Daily Report, dated April 30, 1965 (note 26, *supra*), and Tentative Instructions to Concrete Pipe Inspectors dated May 7, 1965, furnished in response to the Board's call of August 18, 1971.

prepared by the Government and the Table of Comparison Between Bureau's Letter of May 13, 1965, and the Concrete Manual (Exh. 6 of Notice of Appeal), prepared by Cen-Vi-Ro. However, it should be emphasized that Mr. Rippon testified that the Bureau's decision to limit repairs to the pipe was embodied in the May 13 letter (Tr. 1752). It would seem anomalous indeed that the Bureau considered it necessary to instruct its representatives in the field to limit repairs not authorized by the contract.

The task of comparing the provisions of the Concrete Manual and the May 13 letter is complicated by the fact that the terminology used differs. Nevertheless, we proceed with our comparison:

<i>May 13 letter:</i>	<i>Concrete Manual Allows Repair of:</i>
1. Pipes with large fallouts will be re- jected and only pipes with fallouts of one square foot or less are acceptable for repair.	(1) Rock pockets and (2) exposed steel on the outside of any size pipe and on the inside of pipe 36 inches or larger in diameter. ⁴⁹
2. All pipe with scaling or loose and weak interior surfaces will be rejected.	Not covered. ⁵⁰

⁴⁹ The Government asserts that the Concrete Manual is permissive as to what may be repaired and if no size limitations are specified the contracting officer is free to impose such limitations (Brief, p. 111). Cen-Vi-Ro argues that where limitations on the sizes of repairable defects were intended, the Manual supplies them and that if none are specified for a particular defect no size limitations were intended (Appendix I to Claims on DC-6000, Exh. 5N, pp. 2 & 3; Notice of Appeal, p. 22). We think Cen-Vi-Ro has the better of this argument.

⁵⁰ Cen-Vi-Ro points to the provision in the Manual under Section 137(c), Preparation of Imperfections for Repair, calling for the removal of all visibly unsound or imperfect concrete. However, we cannot equate this with an express provision for the repair of pipes with scaling or loose and weak interior

May 13 letter:

3. Pipes having imperfections or damaged areas that extend over six inches of gasket area in the bell or four inches in the spigot will be rejected.

4. Extensive repairs to rock pockets in bells and lack of consolidation of the concrete that will result in poor bond between the concrete and the steel will not be permitted.

5. All pipe having transverse (circumferential cracks) that extend through the wall of pipe will be rejected.

6. Pipe cracked longitudinally for substantially the full length will be rejected. All pipe containing shorter longitudinal cracks must be hydrostatically tested.

Concrete Manual Allows Repair of:

(4) Broken bells containing circumferential reinforcement and (5) impact damage over less than 45° of circumference except for spigots. (8) Spalled shoulders on spigots for support of rubber gaskets. Repairs not permitted on gasketed spigots if break is entirely through shell into or beyond area of gasket bearing and extends more than 4 inches around circumference under gasket.

(1) Rock pockets—no limitation on size.

(6) Fractures or cracks passing through the shell.

(6) Fractures or cracks passing through the shell.⁵¹

From the above it is apparent that the limitation on the repair of

surfaces and consider this a procedure for the repair of pipes otherwise repairable, that is, pipes with the listed imperfections.

⁵¹ With respect to tests on repaired pipe, Cen-Vi-Ro points to paragraph (h) of Section 137 of the Concrete Manual which provides that each pipe on which major repairs have been effected be tested at the service head and for tests on occasional pipe having lesser repairs capable of affecting performance of the pipe to assure the security of such repairs. This paragraph also provides for tests on representative units of cracked but unshattered pipe and states that if there is no leakage, other than sweating at 50-foot head, the pipe may be accepted for heads of less than 50 foot.

fallouts to those of one square foot or less was a restriction on repairs expressly permitted by the Concrete Manual as to pipes 36 inches or larger in diameter, that limitation of repairs to six inches in gasket area of bell was also such a restriction (only in case of impact damage to pipes below 18 inches in diameter—45° on an 18-inch diameter pipe would be approximately seven inches—would it not be restrictive of repairs permitted by the Manual), that the refusal to permit extensive repairs to rock pockets in bell areas may have been such a restriction and that the refusal to permit repair of at least some circumferential cracks⁵² and of some longitudinal cracks were restrictions on repairs permitted by the Concrete Manual.

Notwithstanding the above findings we conclude that the language of the Concrete Manual cannot be interpreted as a mandatory requirement that the Government must allow repair of any and all of the listed defects without regard to magnitude and extent and that some room for the application of judgment as to whether particular defects may be repaired must be allowed.⁵³

⁵² The Tentative Instructions to Concrete Pipe Inspectors provided that pipes having circumferential cracks in the spigot of 12 inches or more would be rejected.

⁵³ Cen-Vi-Ro appears to agree, for in its letter of June 10, 1965 (Exh. 5G), in reply to the Bureau's May 13 letter, Cen-Vi-Ro stated that the specifications allow repair of circumferential cracks but agrees that extensive circumferential cracks should not be allowed and that each section should be judged on its own merits. The same comments are made with respect to longitudinal cracks.

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While the Manual does not expressly define major repair and varying definitions of the term were given at the hearing,⁵⁴ it is clear that under the Manual only repairs such as extend through the shell thickness or large repairs to bell are major. Cen-Vi-Ro's expert witnesses, Mr. Howard F. Peckworth and Dr. Raymond E. Davis, although recognizing that it depended on the extent of the defect, characterized the list of nine normally repairable defects in the Manual as being generally or usually minor repair.⁵⁵ The Government's expert witness, Mr. Walter R. McLean, testified that a major repair is any repair affecting structural integrity of the pipe.⁵⁶ We accept this definition.

⁵⁴ The Bureau's concept of major repair is that all repairs other than those normally accomplished on the rollaway are major (Tr. 1411, 1412). Mr. Herrera was of the opinion that a major repair was anything requiring replacement of concrete and cure to make it part of the original pipe (Tr. 791).

⁵⁵ Tr. 104-108; Deposition of Dr. Davis, pp. 13-15. Mr. Peckworth, whose qualifications as an expert in concrete pipe are clearly supported by the record and were conceded by the Government (Tr. 132), described the late Dr. Raymond E. Davis as "probably the most famous man in the world on concrete" (Tr. 118).

⁵⁶ Tr. 2256. Mr. Borden, Bureau engineer, testified that a patch of a chip or piece of concrete on the outside of a pipe which fell off and which had no bearing on quality would not be a cause for concern (Tr. 1688, 1689). Yet under the Government's definition, this could and probably would be a major repair. The resident engineer was of the opinion that a major repair was a repair to a large area of the bell, repair of an extended length of the spigot groove or a repair to a fallout of any consequence (Tr. 1925). We conclude that the Government's witnesses have repudiated the concept of major repair which is based on where the repairs were accomplished (note 54, *supra*).

A summary prepared by Mr. Kenneth Thomas, chief plant inspector, reflects that 25.6 percent of all pipe units less rejects manufactured under DC-6000 required major repairs (24.6 percent of pipes installed).⁵⁷ The summary reflects that 14.3 percent of total pipes less rejects manufactured under DC-6130 required major repair (14 percent of all pipes installed). These percentages are based in part on Mr. Thomas' estimate from his observations, admitted to be a guess, that 50 percent of pipes produced prior to May 15, 1965, required major repair.⁵⁸ Percentages of pipes requiring major repair produced after May 15 are based on Bureau records. While we have no doubt of Mr. Thomas' sincerity, we cannot accept this analysis as accurate. First, as to pipes requiring major repairs which were produced prior to May 15, 1965, it is admitted to be a guess. It

⁵⁷ Analysis of the State of Production Just Prior to Bureau's May 15 Inventory (Exh. 133, pp. 5 and 7). It appears that the definition of major repair used in compiling this exhibit is all repairs other than those normally accomplished on the rollaway as part of regular production procedure (note 54, *supra*).

⁵⁸ Tr. 1413, 1414, 1599. The record reflects that Mr. Thomas responded at one point with the 50 percent estimate to a question concerning pipe manufactured before May [15] which was repaired after May [15] and at another point with the 50 percent estimate to a question concerning pipe requiring repair which was in inventory or produced prior to May [15] (Tr. 1413, 1414). While we assume that the latter is intended, we note that Department counsel's supplemental brief of March 26, 1971, refers to the estimate as being "of pipes in inventory prior to May 15 requiring repair." The difference could be significant since it appears that R. H. Fulton laid in excess of 1,200 pipes prior to the suspension of laying operations in November of 1964 (par. 86, Findings of Fact).

should be noted that the Government's own record indicates 251 pipes required major repair as of October 17, 1964 (tabulation enclosed with memorandum, dated October 22, 1964, Exh. 8). Second, it is based on a concept of major repair which is at variance with that we have adopted based on the Concrete Manual and testimony of the Government's own witnesses. Thirdly, the Cumulative Daily Pipe Record (DC-6000) as of May 7, 1965, indicates that 10,526 pipes had been manufactured of which 706 required major repair.⁶⁰ Since there is no evi-

dence of the definition of major repair utilized by Cen-Vi-Ro in maintaining its records, we do not consider that the Cumulative Daily Pipe Record is necessarily indicative of all pipes requiring major repair as of May 7, 1965. However, it, nevertheless, represents a record maintained at the time which in our view precludes acceptance of the estimate that 50 percent of all pipe produced prior to May 15, 1965, required major repairs.⁶⁰

We will take up the question of Cen-Vi-Ro's alleged failure to take known corrective action in conjunction with Cen-Vi-Ro's claims for individual changes.

Small Diameter Criteria

Cen-Vi-Ro contends that the Bureau incorrectly interpreted the contract as to internal pipe diameter tolerances thus contributing to the shutdown of laying operations and necessitating the payment of \$100,000 to its subcontractor, R. H. Fulton, referred to previously (note 18, *supra*). Cen-Vi-Ro further alleges that the Bureau's enforcement of an incorrect pipe diameter interpretation resulted in machine operators underfilling the forms and caused flaking interiors, a matter which will be discussed in subsequent paragraphs of this opinion.

Appellant has stipulated that small diameter pipes (as interpre-

⁶⁰ Cumulative Daily Pipe Record for period May 7 to 14, 1965 (App's Exh. 0). The Government, asserts (Supplemental Brief of March 26, 1971, note 58, *supra*) that this figure cannot be accepted because (i) it was copied from Cen-Vi-Ro's records [and presumably represents an incorrect definition of major repair]; (ii) there is no evidence whether it represents pipes marked for repair or actually repaired and (iii) it does not include thousands of faulty pipe in inventory which were not inspected by the Bureau or repaired by Cen-Vi-Ro prior to May 15, 1965. While there is no evidence of the definition of major repair utilized by Cen-Vi-Ro in keeping its records, we have rejected the concept of major repair utilized by the Bureau in compiling Exhibit 133. We see no reason for regarding the figure 706 as anything other than pipes marked for major repair anymore than there is for regarding the figure 668 (App's Exh. 0) as anything other than pipes marked for special hydro as of May 14, 1965 (Tr. 1607). We refuse to believe that the Bureau copied figures into its records which were completely devoid of meaning. Reason (iii) advanced by counsel will not withstand analysis. Page 1 of Exhibit 133 reflects that 10,641 pipes had been manufactured under DC-6000 through May 7, 1965 (Tr. 1582-1585), of which 612 had been rejected, 7,698 accepted, 664 marked for special hydro and 1,667 were unclassified (that is tests not complete or not submitted to Bureau, etc.). Mr. Lincoln admitted that at this time only approximately 700 pipes had not been inspected by the Bureau (Tr. 1930). Accordingly, it is apparent that there could not be thousands of pipes in inventory which had not been inspected by the Bureau.

⁶⁰ It is of interest that in the meeting of July 24, 1965, Mr. Rippon is quoted as saying that it was not the intent of the specifications to permit repair of 400 to 500 sections of pipe with these types of defects (p. 6, Notes on Meeting, note 46, *supra*).

ted by the Bureau) were manufactured in July, August and September 1964.⁶¹ However, because Cen-Vi-Ro at this time did not normally measure the internal diameter of the pipe prior to presenting it to the Bureau⁶² and because pipes were not always presented for inspection as manufactured, the full extent of small diameter pipes did not come to light until October 1964.⁶³

By letter, dated October 16, 1964 (Exh. 5B), the project engineer approved the substitution of 9,280 lineal feet of undersized 54-inch pipes for full size pipes provided larger size pipes were substituted to compensate for excess friction loss. In a letter, dated October 30, 1964 (Exh. 5C), appellant reported the existence of 1,054 pipes totaling 17,784 linear feet classified as small diameter and furnished a listing of proposed substitutions.⁶⁴ The letter

stated that corrective measures had been initiated which had substantially eliminated the problem of small diameters.⁶⁵ Substitutions proposed by appellant (except for 40 units of 72-inch pipe for which appellant had not proposed to compensate for friction loss) were approved by the project engineer's letter of November 23, 1964 (Exh. 5D), upon the understanding that manufacturing procedures were being corrected to eliminate overfilling. However, the manufacture of some small diameter pipes continued⁶⁶ and by letter, dated January 21, 1965 (Exh. 14), the project engineer expressed his concern and suggested that appellant review its manufacturing procedures to assure that pipes were manufactured in accordance with the specifications.

⁶¹ Tr. 568. The record amply supports this stipulation. The first instance of pipe rejected for small diameter appears in an Inspectors Daily Report, dated July 29, 1964. A total of 34 66-inch pipes are reported as undersize as of August 29, 1964 (Inspectors Daily Report, dated August 31, 1964).

⁶² Tr. 587, 1899; memorandum, dated September 20, 1966, Exh. 34. Mr. Franklin testified that this was because Cen-Vi-Ro had always met their design "Q", i.e., required flow in cubic feet per second (Tr. 354, 587).

⁶³ Tr. 352; memorandum, dated September 20, 1966, note 62, *supra*. However, an Inspectors Daily Report dated September 29, 1964, states that Cen-Vi-Ro was quite concerned about undersize pipes. A summary attached to a memorandum, dated October 22, 1964 (Exh. 8) indicates that 1,045 pipes were classified as small diameter as of October 17, 1964, of which 676 were 54-inch diameter.

⁶⁴ When asked how many of the pipes would have been small diameter even under Cen-Vi-Ro's interpretation, Mr. Franklin replied that "I would say it would be a number. I know, I feel reasonably sure that it would be equal to

the amount requested in the substitution proposal because some of those were marginal and then we undoubtedly produced some pipe by the time that was requested; after the time that it was requested, it was excessive." (Tr. 589).

⁶⁵ The corrective measures included milling the forming rings at the ends of the pressure roller, building up the roller in the center and instructing machine operators not to overfill the forms (Tr. 355, 356, 360-362; Inspectors Daily Report, dated October 3, 1964).

⁶⁶ Tr. 838, 839. It appears that during the five-month period November 1964 through March 1965, only 158 additional small diameter pipes were produced (memorandum, dated September 20, 1966, note 62, *supra*). However, an Inspectors Daily Report, dated March 27, 1965, reflects that eight small diameter pipes had been manufactured on the preceding day. It is interesting to note that memoranda written by Mr. Franklin to Raymond International, Inc., as late as May 1, 1965, reflect concern over the production of small diameter pipe and that during the meeting of July 24, 1965, Mr. Klesel, Vice President of Raymond, indicated that small diameters were one of the major problems facing Cen-Vi-Ro (p. 7, Notes on Meeting, note 46, *supra*).

The referenced correspondence contains no hint of any disagreement by Cen-Vi-Ro with the Bureau's interpretation of what constituted small diameter pipe. Other actions of Cen-Vi-Ro personnel at the time are also consistent with acceptance of or acquiescence in the Bureau's interpretation of internal pipe diameter requirements.⁶⁷ While Mr. Franklin testified and Mr. Thomas confirmed that there were numerous discussions concerning interpretations of the specifications, how pipes were to be measured, why small diameter pipes were produced and how they could be eliminated, Mr. Franklin admitted that he did not object to the Bureau's interpretation at first, and was less than positive as to any later disagreement with the Bureau's interpretation.⁶⁸ Indeed, at one point he admitted that it was pure speculation as to what he said (Tr. 570). In later testimony he asserted that Bureau representatives were told that their method of measuring the pipes was incorrect (Tr. 571, 572). While he indicated that these conversations occurred in late October 1964, he subsequently stated that he did not know the dates of these conversations. His explanation for not sub-

⁶⁷ An Inspectors Daily Report, dated October 8, 1964, states that Cen-Vi-Ro was checking internal pipe diameters prior to Bureau inspection in order to avoid having patchers waste time on small diameter pipes. Inspectors Daily Reports, dated October 9, 1964, and thereafter, reflect the acceptance as reclaims of pipes upon which the interiors had been ground out to enlarge the bore.

⁶⁸ Tr. 353, 569, 1434. He stated "I feel sure that I expressed my opinion that the pipe * * * probably would meet the measurement specifications on proper interpretation." (Tr. 569.)

mitting the matter to the Bureau in writing was that it did not occur to him that it would be expected (Tr. 575). We note that at the conference of October 30, 1964, Cen-Vi-Ro's representatives were asked to comment on Government procedures which they considered were delaying the work and that the reported response was that they were cognizant of no such procedures, either at the work site or at the pipe manufacturing plant (letter, dated October 30, 1964, note 14, *supra*). The only documented instance of Mr. Franklin's disagreement with the Bureau's interpretation occurred at the meeting of August 25, 1966 (memorandum, dated September 20, 1966, note 62, *supra*).

Mr. W. B. Murray testified that in late January 1965 he protested verbally to Mr. Thomas and Mr. Lincoln the criteria applied by the Bureau in determining that pipes were small diameter (Tr. 837, 886, 887). He stated that the specification was reviewed word for word, that a free-hand sketch of the Bureau's and Cen-Vi-Ro's interpretations was prepared and that Mr. Charles Davis, Bureau inspector, was present (Tr. 887-888). He did not have any explanation of why a written protest was not made to the Bureau. Mr. Lincoln stated flatly that Cen-Vi-Ro's representatives did not indicate any disagreement with the Bureau's interpretation of small diameter pipe between June and October 1964 (Tr. 1900). When asked whether prior to March of 1965 a request had been made to ac-

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cept pipes in accordance with a sketch similar to that shown on page G-6 of Exhibit 5M, which reflects Cen-Vi-Ro's interpretation, he answered, "Not to my recollection." (Tr. 1906). Under cross examination, he admitted that Cen-Vi-Ro had complained "far before" the meeting of August 25, 1966, about pipe sizes and that the only thing new brought up at this meeting was the alleged relationship between small diameters and flaking interiors (Tr. 1943).

Mr. Thomas testified that he did not believe Cen-Vi-Ro indicated any disagreement with the Bureau's interpretation of small diameter pipe prior to March of 1965 (Tr. 1434). He testified that during the first week in March 1965, he had a conversation with Mr. Franklin concerning small diameter pipe under paragraph 67.j. of the specification.⁶⁹ He stated that Mr. Franklin had made up a sketch showing variations in diameter compared to lengths of pipe and inquired if pipe could be accepted in accordance with the sketch.⁷⁰ He asserted that even then it was not a question of whether the Bureau's interpretation was correct, but simply whether pipe could be accepted in accordance with those tolerances (Tr. 1435). The Board finds that any

disagreement by Cen-Vi-Ro with the Bureau's interpretation of internal pipe diameter tolerances was not conveyed to the Bureau until late January 1965 at the earliest.

Cen-Vi-Ro's request was discussed with the Chief Engineer's Office in Denver by telephone on March 8, 1965, and it was determined that the pipe could be accepted.⁷¹ Mr. Lincoln testified that Cen-Vi-Ro was notified of the approval within a day or two thereafter.⁷² In earlier testimony, Mr. Thomas referred to the date the Bureau agreed to accept small diameter pipe as about March 19, 1965 (Tr. 1318). This resulted in the acceptance of pipes having a restricted area double the first permissible overfill even though the restricted area extended more than one-fourth the length of the pipe (Tr. 1905). There were no final rejects under DC-6000 due to pipes being classified as small diameter by the Bureau (Tr. 589, 590). The Government

⁶⁹ Tr. 1905, 1906, 2051. Mr. Thomas testified that if Cen-Vi-Ro had expressed disagreement with the Bureau's interpretation at an earlier date, he would have taken the matter up with his superiors and there would be memoranda to that effect (Tr. 1434). However, the only documentary evidence in the record of the Bureau's relaxation of pipe diameter tolerances is a memorandum signed by Mr. Lincoln, dated September 20, 1966 (note 62, *supra*), which is long after the events in question. While the memorandum confirms the March 8, 1965, telephone conversation with the Chief Engineer's Office, it does not state when Cen-Vi-Ro was notified of the decision to relax internal pipe diameter tolerances.

⁷² However, Mr. Franklin, whose recollection was refreshed by reference to a Cen-Vi-Ro diary entry not in evidence, testified that Cen-Vi-Ro was not notified of the relaxation of internal pipe diameter tolerances until April 12, 1965 (Tr. 369-371). We accept this testimony as accurate.

⁶⁹ A memorandum, dated February 8, 1965, signed by Mr. M. J. Franklin, refers on page 2 to recent trips to the project construction engineer's office in which he requested relief for installation of pipes with slightly smaller bore (Cen-Vi-Ro Correspondents).

⁷⁰ Tr. 1434, 1435. The sketch was similar to that shown on page G-6 of Exhibit 5M (Tr. 1905), which is dated November 23, 1965.

states that the relaxation of pipe diameter tolerances was a waiver of strict compliance with the specifications and not an acknowledgment that the Bureau's interpretation was incorrect. Mr. Lincoln testified that the reason for the waiver was that Cen-Vi-Ro had improved its techniques so that small diameters were being eliminated and the few that were being made were not a threat to the properties of the line (Tr. 1907).

Mr. Murray testified that, when he arrived at the plant in January 1965, the principal problem was considered to be the production of small diameter pipe (Tr. 887). He stated that the project engineer's letter of January 21, 1965 (Exh. 14), increased the concern that Cen-Vi-Ro would be unable to substitute small diameter pipe and made it more imperative that pipe be produced in accordance with the Bureau's interpretation of the specifications. He asserted that he insisted that the operators not make small diameter pipe even though he disagreed with the Bureau's interpretation (Tr. 890-892).

Permissible variations in internal diameter for the various pipe sizes are contained in Subparagraph 67.j. (1), Specifications DC-6000. This subparagraph provides in part:

j. Miscellaneous requirements.

(1) Sizes and permissible variations—Variations of the internal diameter shall not exceed plus or minus 1.50 percent for pipe having an internal diameter of 12 to 24 inches, inclusive; 1 percent for pipe 27

to 36 inches, inclusive; and 0.75 percent for 39-inch diameter and larger; *Provided*, That in not more than 10 percent of the pipe units of any one size to be installed in one continuous reach of pipeline, up to two times the above listed permissible variations will be accepted if such variation does not extend more than one-fourth of the length of the pipe unit. Within this distance the net area of the pipe opening shall not be reduced by more than 4 percent for pipe having internal diameters of 12 to 36 inches, inclusive, or more than 3 percent for pipe having internal diameters 39 inches and larger and the transitions to the restricted area shall be gradual and smooth.

Contentions of the parties concerning the proper interpretation of this subparagraph are reflected on the drawings (pp. G2 and G6 of Exh. 5M; Exhs. 5P and 118). The Government asserts that this language clearly means that any variation in permissible diameter in addition to the original 0.75 percent for pipe 39 inches in diameter or larger must not exceed one-fourth the length of the pipe.⁷³ This was the interpretation enforced by the Bureau until April of 1965 (note 72, *supra*) and the interpretation adopted by the contracting officer. Cen-Vi-Ro, on the other hand, vigorously argues that the quoted paragraph can only mean that a variation of two times 0.75 percent of the pipe diameter may extend for one-quarter the length of the pipe and that in addition there shall be a gradual and smooth transition to the restricted one-fourth area.⁷⁴

⁷³ Statement of Position, IBCA-718-5-68, pp. 27-31.

⁷⁴ Pages 5-8, Notice of Appeal, Exh. 6.

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If "restricted area" in the phrase "and the transitions to the restricted area" be read as referring to an area one-fourth the length of the pipe, there can be no doubt that Cen-Vi-Ro's interpretation has something to be said for it. The language "does not extend more than one-fourth of the length of the pipe" would seem to warrant the view that the maximum variation can extend up to one-fourth the length of the pipe. However, if the transitions to the "restricted area" must be within one-fourth the length of the pipe, the maximum permissible variation cannot extend for one-fourth the length of the pipe, but, of necessity must be somewhat less.⁷⁵ Nevertheless, to accept Cen-Vi-Ro's position would largely nullify the one-fourth of the length of the pipe limitation. This is so because under Cen-Vi-Ro's interpretation one-fourth of the length of the pipe operates as a restriction only on the maximum permissible variation and is inapplicable to all lesser variations beyond the origi-

nal variation and all transitions to the second variation. In addition, Cen-Vi-Ro's position does not appear to recognize the opening phrase of the final sentence, "Within this distance * * *," which in our view can only refer to a distance of one-fourth the length of the pipe and serves to eliminate doubts that transitions to any variation in addition to the 0.75 percent for pipes 39 inches in diameter and larger must be within one-fourth of the length of the pipe. It is, of course, well settled that an interpretation which gives effect to all terms of a contract is to be preferred to one which would nullify or render meaningless other terms of the contract.⁷⁶

Another reason why the Government's interpretation is to be preferred is that in mid-October 1964 when the magnitude of the small diameter problem was brought to its attention with the classification of 1,045 pipes as undersize, Cen-Vi-Ro took actions which are only consistent with acceptance or acquiescence in the Bureau's interpretation. First, it milled the forming rings at the end of the pressure roller and built up the roller in the center in order to increase the diameter of the pipes and instructed the operators not to overfill the forms. Secondly, it took measures to grind the interiors of pipes rejected for small diameter, in order to enlarge the bore of the pipes and gain their acceptance. Thirdly, it wrote the letter of Oc-

⁷⁵ This is illustrated by the drawing (Exh. 5P) which the Government alleges represents the correct interpretation of the cited subparagraph. The effect of the Bureau's interpretation was to preclude Cen-Vi-Ro from taking advantage of the maximum permissible variation for one-fourth of the length of the pipe since Mr. Murray testified that it was impossible with the straight line of the packer roller to have the roller riding on the end rings and still be able to obtain the maximum tolerance allowed by the specifications for a 4- or 5-foot section in the center of the pipe (Tr. 888). Of course, this result is not peculiar to the Cen-Vi-Ro process, but is inherent in the view that transitions must be within one-fourth the length of the pipe.

⁷⁶ *Hol-Gar Manufacturing Corp. v. United States*, 169 Ct. Cl. 384 (1965), and cases cited.

tober 30, 1964, requesting approval of substitutions of larger diameter pipes in order to compensate for excess friction loss through installation of the small diameter pipes without expressing any disagreement with the Bureau's interpretation. The letter stated in part "corrective measures have been initiated which have substantially eliminated the manufacturing of small diameters." Although the letter is explainable by Mr. Franklin's testimony that the pipes upon which substitution were requested would have been small diameter even under Cen-Vi-Ro's interpretation (note 64, *supra*), acceptance of this testimony would largely negate the small diameter claim. Mr. Franklin admitted that Cen-Vi-Ro did not object to the Bureau's interpretation at first. The conclusion is inescapable that Cen-Vi-Ro found the Bureau's interpretation sufficiently reasonable in the first instance that it did not take issue therewith. Under these circumstances, the doctrine of contemporaneous construction is for application.⁷⁷ Even if Mr. Murray's testimony that he protested the Bureau's interpretation in late January of 1965 is accepted, we hold that a disagreement with the Bureau's interpretation first expressed over three months after the problem was

brought to the fore comes too late to alter the result.⁷⁸

Cen-Vi-Ro argues that the fact the Bureau to this day insists that its view of the contract is the only and correct interpretation establishes that a written protest would have been unavailing and that the Bureau has not shown that it was prejudiced by the absence of such a protest. The doctrine of contemporaneous construction is not dependent on a showing of prejudice but is instead founded on the premise that the actions of the parties prior to a dispute is the most persuasive evidence of the meaning to be accorded a contract provision which might reasonably be susceptible to differing interpretations.

For the reasons set forth above, we hold that the Bureau did not misinterpret the contract as to permissible internal pipe diameter tolerances and that even if Subparagraph 67.j.(1) be regarded as ambiguous and Cen-Vi-Ro's interpretation reasonable, Cen-Vi-Ro accepted and acquiesced in the Bureau's interpretation. The appeal as to the criteria for determining small diameter pipes is denied.

Drummy Concrete

Cen-Vi-Ro asserts that the Bureau improperly rejected many pipes for alleged drummy concrete (Claim of October 13, 1966, Exh. 5m, p. C4). These were pipes manufactured on the 20-foot spinner (principally prior to May 15, 1965),

⁷⁷ See cases note 43, *supra*. Or as stated by the Court "* * * the construction that the parties have themselves placed on a contract provision *ante litem motam* should not be disturbed when at a later date, the meaning of the provision is called into question by one of them." *S. S. Silberblatt, Inc. v. United States*, 193 Ct. Cl. 269-319 at 278 (1970).

⁷⁸ *The Jordan Company*, ASBCA No. 10874 (December 15, 1966), 66-2 BCA par. 6030.

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which had concrete of a different color or texture at the points where the gyro rings encircled the forms in which the pipes were made (Tr. 98, 1847). As noted previously, the Bureau took the position that gyro area concrete was porous or unconsolidated and did not conform to Subparagraph 67.(c) of the specifications requiring freedom from defects such as blisters and drummy areas⁷⁹ or other evidence of excessive segregation of aggregate (Tr. 1493, 1494, 1847, 1848). Mr. W. B. Murray testified that some of this concrete contained voids varying from an inch to an inch-and-a-half in depth (Tr. 861, 862, 906). However, he stated that the gyro area was not visible on "a lot of pipe" containing this type of concrete (Tr. 818) thus indicating that the gyro area did not extend through the pipe wall. Mr. M. J. Franklin and Mr. Mike Herrera, production manager for Cen-Vi-Ro after July 10, 1965, conceded that in some instances gyro area concrete did not conform to the specifications (Tr. 472, 741). When asked how he would classify gyro ring concrete as compared to concrete in the remainder of the pipe, Mr. Franklin answered, "Not as good." (Tr. 471).

In accordance with the resident engineer's memorandum of May 24, 1965, many, if not most, of the pipes with gyro area concrete were sub-

jected to hydrostatic tests, called "special hydros" because they were not required by the contract, as a condition of their acceptance.⁸⁰ Some of these pipes were rejected even after passing hydrostatic tests because the Bureau questioned the structural soundness of the pipe.⁸¹ Cen-Vi-Ro concedes that concrete in the gyro areas on some of the pipes was not as dense as that in the remainder of the pipe (Claim of October 13, 1966, Exh. 5M, p. C4). However, Cen-Vi-Ro contends that this concrete was of quality sufficient

⁸⁰ An Inspectors Daily Report, dated July 20, 1964, states that Cen-Vi-Ro agreed to test enough pipe to assure the Bureau and themselves that gyro areas would not leak. Mr. Hubbard testified that Cen-Vi-Ro tested six sections of pipe having gyro area concrete, which at first exhibited minor dripping but were watertight within a few days (Tr. 1103, 1105, 1129, 1131, 1132). While the Bureau at one time appears to have agreed to this method of proving acceptability of otherwise doubtful pipes (memorandum dated February 18, 1965, note 45 *supra*; p. 9, Notes on Meeting of July 24, 1965, note 46, *supra*), it subsequently refused to rely upon such tests for determining the acceptability of various pipe having such defects or flaws (Tr. 1104, 1406, 1407). An Inspectors Daily Report, dated June 8, 1965 (Exh. 100) refers to three 72-inch pipes with seeps at gyro ring areas which were to be filled with water for seven days to ascertain if the seeps healed. The record does not show the results of these tests. Inspectors Daily Reports, dated July 8 and 9, 1964, reflect that two pipes apparently tested for gyro ring areas healed sufficiently for acceptance. Mr. Thomas testified that hydrostatic tests were conducted on pipes, including those with gyro areas, which still leaked after seven days (Tr. 1406, 1407).

⁸¹ Tr. 1493, 1494; letter from project engineer dated May 31, 1966, Exh. 5N, pp. 30-31. The letter describes gyro area concrete as "honeycomb, popcorn-type" of extremely questionable structural competence and states that where the uncompacted area was large the pipe has been rejected, even though it passed hydrostatic tests, in order to preclude the installation of structurally weak units in the line which might subsequently crack under the weight of the backfill with superimposed loads.

⁷⁹ Drummy concrete refers to voids in the pipe wall created by the entrapment of water which is subsequently absorbed or evaporates. It is detected by differences in sound created by striking the wall with a hammer or other instrument (Tr. 99, 858, 859).

to meet the requirements of the specifications. It denies that gyro area concrete was blistered, drummy or evidenced excessive segregation of aggregate and denies that the structural competence of the pipe was thereby endangered (Exh. 5M, p. C4; Appendix to Claims on DC-6000, Exh. 5N, pp. 4, 5; Notice of Appeal, pp. 15-17). We note, however, that Cen-Vi-Ro refers to attempts to "eliminate all of the segregation of aggregate and drummy areas on the pipe surface at the gyro rings" (Exh. 5M, p. C10).

In support of its contention that pipes with gyro area concrete were properly rejected, the Government points to the testimony of Mr. Peckworth who stated that if pipes leaked at gyro areas on hydrostatic tests, the concrete in such areas was unconsolidated (Tr. 225). It also relies upon the results of special hydrostatic tests which indicate that out of 291 pipes tested for gyro areas, 185 or approximately 64 percent failed (Hydrostatic Test Study, Exh. 64). Cen-Vi-Ro objected to testimony concerning test failures and by implication to the introduction of this Study in the absence of a clear definition of failure (Tr. 862, 863, 907, 908), asserting that many of the pipes classified as failures by the Bureau would have healed within a seven-day period.⁸²

⁸² The process by which concrete will heal or seal itself is referred to as "autogenous healing" (Tr. 94, 95; Concrete Pipe Handbook, p. 358 *et seq.*, Exh. 102). The healing process requires the presence of moisture.

Cen-Vi-Ro's position as to the validity of these test results will be covered in detail under the heading of "Testing Criteria." For reasons therein stated, we accept as *prima facie* valid the test results shown by the Government.

Cen-Vi-Ro complains of the Bureau's refusal to permit pipes having gyro area concrete to be repaired prior to hydrostatic testing. It will be recalled that paragraph 5 of the resident engineer's memorandum of May 24, 1965, permitted the repair of drummy areas of poor consolidation similar to gyro areas prior to testing only if the drummy concrete could be removed by shallow excavation. A memorandum, dated May 22, 1967 (Exh. 89), written by Mr. Dess Chappellear, Bureau engineer in charge of pipe laying under DC-6130, states that rock pockets or drummy areas were cause for rejection if the defective area exceeded one inch in depth. The record indicates that in general Bureau inspectors at the plant and in the field endeavored to apply the same criteria for rejection (Inspectors Daily Report, dated August 4, 1965). The Board finds that shallow excavation was defined as not exceeding one inch in depth. Although the specification (Subparagraph 67.g.) requires that pipes below 72 inches in diameter have a minimum of $\frac{3}{4}$ of an inch of concrete cover over reinforcing steel (one inch for pipe of 72 inches and larger diameter), the Concrete Manual clearly contemplates the repair of defective concrete extending into or beyond rein-

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forcing steel.⁸³ There is no evidence of the number of pipes with drummy or unconsolidated areas which were within the Bureau's definition of "shallow excavation."

It is, of course, reasonable to suppose that at least some of the pipes tested for gyro area concrete would have passed hydrostatic tests if repairs had been effected prior to conducting the tests. Indeed, it appears that the Bureau's concern that a superficial repair might conceal a serious structural weakness was the reason for refusing to permit substantial repairs prior to testing (note 81, *supra*). Understandably, there is no evidence of the number of failing pipes, which, if repaired, would have passed the test. However, in order to find merit in Cen-Vi-Ro's complaint, it is necessary to find that gyro area concrete is normally repairable.

The resident engineer's memorandum of May 24, 1965, clearly regards gyro concrete as similar to drummy areas. Mr. Chappellear's memorandum of May 22, 1967, indicates that he regarded drummy areas and rock pockets as similar if not identical. The Government's expert witness, Mr. Walter McLean, equated gyro areas with rock pock-

ets (Tr. 2289, 2311). He testified that gyro areas on pipes which he observed were not completely unconsolidated.⁸⁴ Mr. Murray, although denying that all gyro area concrete was sufficiently unconsolidated to constitute a rock pocket, testified that some unconsolidated gyro areas were very similar to rock pockets (Tr. 939). The resident engineer testified and questions of Government counsel indicate that gyro areas were regarded as rock pockets (Tr. 1129, 1850, 1851). The tabulation "Change of Inventory Status as of 5-16-65" attached to memorandum, dated May 27, 1965 (note 27, *supra*), includes very bad gyro areas under the heading of pipes rejected for rock pockets. The Board finds that gyro area concrete on an undetermined number of pipes was unconsolidated to some extent and thus constituted a defect within the meaning of Subparagraph 67.(c) of the specifications.⁸⁵ We further find that these unconsolidated areas were similar or iden-

⁸⁴ Mr. McLean examined pipes in the yard at Cen-Vi-Ro's plant in Plainview, Texas, and in Hobbs, New Mexico, in May of 1970 (Tr. 2246). He found only one pipe he considered acceptable. The largest percentage of the pipes which he examined were 21 and 27 inches in diameter. The majority of the larger size pipes he examined had been moved from Cen-Vi-Ro's plant. He left no doubt that he did not favor any repairs to concrete pressure pipe (Tr. 2246-2252, 2257, 2258, 2263, 2326). Since the standards invoked by Mr. McLean are not consistent with the contract before us, we find his testimony in this regard to be unpersuasive.

⁸⁵ We note that the final sentence of Subparagraph 67.e.(3) of the specifications provides with respect to spun pipe: "The duration and speed of spinning shall be sufficient to completely distribute and thoroughly consolidate the concrete and produce an even interior surface." (*Italics supplied.*)

⁸³ Paragraph (b), Methods of Repair of Section 137 of the Manual at page 355, characterizes as shallow excavation exposed steel on the outside of any size pipe and on the inside of pipe 36 inches or larger in diameter and provides in part: "Pneumatically applied mortar should not be used where more than one-half square foot of the area to be repaired extends back of reinforcement steel. Preshrunk concrete should be used for the repair of all other imperfections including areas where more than one-half square foot of the area extends back of reinforcement steel."

tical to rock pockets and thus normally repairable in accordance with the Concrete Manual.⁵⁶ It follows that to the extent hydrostatic test failures are attributable to the Bureau's unjustified refusal to allow permissible repairs, the test results may not be accepted as indicative of substandard pipe.

Mr. Peckworth, who examined every third row of an estimated 2,000 pipes remaining in the yard at Cen-Vi-Ro's plant at Plainview, Texas, on January 16 and 17, 1967,⁵⁷ testified that concrete in gyro areas of pipes which he examined was not drummy or blistered and did not evidence excessive segregation of aggregate (Tr. 98-103). He was of the opinion that the gyro areas did not extend through the pipe wall and that the existence of such concrete did not afford a reasonable basis for questioning the structural soundness of the pipe. He stated that his observations gave him a "good, fair example (sic) of pipe in the yard" (Tr. 41, 42). See also Tr. 148-150. He estimated that 50 per-

cent of the rejected pipe in the yard should have been accepted or repaired under the specifications (Tr. 114). He testified that his examination and determinations were made in the light of the specifications and the Concrete Manual. We assume that "repaired" means acceptable with repairs in accordance with the Concrete Manual.

Mr. Peckworth asserted that the only report made to Cen-Vi-Ro was "* * * that it was a pretty tough project" (Tr. 152). Although we respect Mr. Peckworth's expertise in the field of concrete pipe, we find his testimony as to the number of acceptable pipes or which could be made so to be lacking in specificity and too general to be of substantial probative value. We think that as a minimum Cen-Vi-Ro had an obligation to identify pipes which it considered were improperly rejected.⁵⁸

⁵⁶ Photos Y and AA attached to the Government's statement of position as well as other documents prepared by the Government, e.g., Exhs. 146 and 5Q, characterize gyro area concrete as unconsolidated.

⁵⁷ Tr. 40. There were a total of 1,670 rejected large diameter pipes (54 inches and above) in the yard on June 20, 1966, and 1,078 small diameter pipes (18 through 27 inches in diameter) which were rejected under DC-6130 in July of 1966 (Comparison of Rejected Pipe Remaining in Pipe Yard on June 20, 1966, Exh. 5Q; Comparison of Rejected Pipe Remaining in Pipe Yard July 1966 to Total Production, Exh. 81Q). The record does not indicate how many, if any, of these pipes had been removed at the time of Mr. Peckworth's visit. There were an additional 86 apparently acceptable but surplus pipe in the yard in December of 1966 (Exh. 37).

⁵⁸ We think there is merit in the Government's assertion (Brief, p. 133) that Cen-Vi-Ro has largely eschewed identification of particular pipes which it considers were improperly rejected. For example, Mr. Murray testified that after May 13, 1965, he took photographs of pipes that were in dispute (Tr. 913); yet, no proffer of any such photographs was made at the hearing. Further, Reject Certifications, slips signed by representatives of the Bureau and Cen-Vi-Ro (Exh. 121), which identify particular pipes, state the Bureau's reasons for rejection and Cen-Vi-Ro's comments thereon; were largely discontinued after June of 1965 (Tr. 623), even though it would seem that these slips were a ready means of documenting the Bureau's alleged improper inspection practices. Our examination of the approximately 365 slips identifying particular pipes under DC-6000 indicates that in the great majority of instances Cen-Vi-Ro's representatives agreed with the action taken and that disagreement was over whether a leaking pipe would heal or whether a defective or damaged pipe was repairable. We note that a few of the slips are dated in early April 1966. We also note that 131 of the reject slips are dated May 4, 1965, and listed as CVR rejects.

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There is also a question of Cen-Vi-Ro's capability and willingness to satisfactorily repair pipes, assuming the pipes were repairable in accordance with the Manual.⁸⁹

Dr. Raymond E. Davis examined a total of 226 pipes selected randomly which remained in the yard at Cen-Vi-Ro's plant in Plainview, Texas, during the period March 20-25, 1967.⁹⁰ The record does not indicate the number of pipes in the yard at this time. Dr. Davis supported Mr. Peckworth's testimony that gyro area concrete was not drummy, blistered and did not evidence excessive segregation of aggregate (Deposition, pp. 9, 10). He testified that the existence of such concrete would not appreciably affect the ability of the pipe to withstand internal hydrostatic pressure or to withstand external loads produced by backfill (Deposition, p. 11). He characterized gyro area concrete as shown on a photo (photo Y, attached to Statement of Position, which the Government states is typical) as a very minor defect (Deposition, pp. 76, 77). He recognized, however, that the area at the surface was not completely consolidated and stated that if the area was real or more "popcornlike"

(photo AA, attached to Statement of Position), he would hydrotest the pipe or chip out the "popcorn" and replace it with a quality patch (Deposition, pp. 77, 78).

We think it evident that Dr. Davis' conclusion that gyro area concrete was a very minor defect rested on the premise that the unconsolidated area was shallow and that the reinforcing steel was covered, for he indicated that if the "popcorn" area extended through the pipe wall, he would reject the pipe. He stated that the unconsolidated area would be worse or more pronounced on the outside of the pipe. Although he testified that he did not see any pipes where the unconsolidated area extended through the pipe wall, he considered that 17 of the 23 pipes he examined which were rejected for gyro area concrete were properly rejected.⁹¹ Dr. Davis considered that five of the remaining six pipes were acceptable as is or with some repairs and that one pipe with gyro area concrete should be hydrostatically tested.⁹²

⁸⁹ Deposition, p. 78; Summary of Prof. Davis' Comments on Pipe in Plainview, Texas, Exh. 2 of Deposition. The Government questions whether this exhibit is included in the record (Brief, p. 122). We think it obvious that a necessary concomitant of the admission of the Deposition (Tr. 395, 396) is the admission of any attached exhibits.

⁹⁰ Mr. Franklin testified that the cost of repairs as compared with the cost of a new pipe and scheduling, i.e., the necessity for particular pipes in point of time, were all considered in determining whether to undertake repair (Tr. 545, 546).

⁹¹ Deposition, pp. 3, 4. Dr. Davis testified that his examination and determinations were made after a study of the specifications and other documents bearing on the acceptance and rejection of pipe and in accordance with the specifications and concrete manuals (*Id.*).

⁹² The validity of Dr. Davis' conclusions is weakened by the fact that only 58 of the 111 pipes he considered acceptable as is, or with some repairs, were identified in response to Government interrogatories (Exh. 124). The Government's reasons for the rejection of these pipes are set forth on a schedule (Exh. 154). This schedule includes only two pipes rejected for gyro areas, of which one is indicated to have failed two hydrostatic tests (Final Inventory of Rejected Pipe, Exh. 152, p. 50), and the other is listed as a Cen-Vi-Ro reject.

The Board finds that unconsolidated areas on the great majority of pipes rejected for gyro area concrete did not extend through the pipe wall. We further find that the Bureau did, in fact, restrict repairs to gyro area concrete, which was normally repairable as rock pockets in accordance with the Concrete Manual.⁹³ We find that unconsolidated areas on an undetermined number of pipes with gyro area concrete were so substantial as to justify their rejection notwithstanding that the Concrete Manual does not place any size or depth limits on the repair of rock pockets.

Ten pipes manufactured on the 20-foot spinner were rejected for rock pockets prior to the May 15 inventory (Exh. 59). It appears that approximately 19 pipes were rejected outright for bad gyro areas during the May 15 inventory (tabulation attached to memorandum,

⁹³ Note 83, *supra*. Although the Bureau agreed to consider allowing the repair of "minor gyro ring areas" after, as well as before, hydrostatic testing (Inspectors Daily Report, dated July 9, 1965; memorandum of Bureau Meeting, dated July 9, 1965, Cen-VI-Ro Correspondence), there is no evidence that any significant repairs to gyro ring areas were ever allowed after May of 1965. It is clear that Bureau representatives from Denver did not favor any repair to gyro areas (Inspectors Daily Report of July 22, 1965). The chief plant inspector's memorandum of March 31, 1966 (note 29, *supra*), did allow leakage at gyro ring areas on hydrostatic tests to be cured if it could be accomplished by repair of a "small area." There is no evidence of the area regarded as "small" or the number of such pipes. We note that a Reject Certification (note 88, *supra*) states that one pipe (72A25X20, No. 5D, mfg. 3-11-66) leaked on hydrostatic test, was repaired, passed the test and accepted. There is evidence and we find that gyro areas in excess of one square-foot were considered not repairable by the Bureau (Photo 5208, p. 101, Vol. II, and photo 3622, p. 15, Vol. IV, Exh. 40).

dated May 27, 1965, note 27, *supra*). An additional 404 pipes were marked for special hydrostatic tests of which approximately 267 were for bad gyro areas. Of these 404 pipes, 102 had been previously accepted (tabulation enclosed with Special Report, dated May 21, 1965, note 24, *supra*). The tabulation contains headings reflecting that the 404 pipes required special hydrotests to determine acceptability.⁹⁴ An explanatory note states that almost all of the 102 previously accepted pipes were marked for special hydro because of gyro ring areas. The Board finds that this reference is to 94 of the previously accepted pipes which were manufactured on the 20-foot spinner. Prima facie these 94 pipes complied with contract requirements. A total of 102 pipes previously rejected for gyro area concrete were accepted during the reclaim program (Summary of Pipe Units Reclaimed, Exh. 146).

The Summary purportedly represents the disposition of all pipes rejected during the May 15 inventory which were subsequently accepted.⁹⁵ Although we have found

⁹⁴ This supports Cen-VI-Ro's contention that some pipes were neither accepted nor rejected, but were placed in limbo and that contrary to the contract, the Bureau substituted hydrostatic tests as determinative of acceptability (Notice of Appeal, p. 29; Tr. 350). We note, however, that Dr. Davis apparently considered the acceptability of at least one pipe with gyro area concrete to be sufficiently doubtful as to require the issue to be determined by a hydrostatic test.

⁹⁵ Tr. 2135; "Disposition of Pipes Initially Rejected in the May 15, 1965 Inventory," App's Exh. C. This summary was originally included in the appeal file as Exhibit 92. It was among the documents expunged on appeal.

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that pipes marked for special hydro in the May 15 inventory were not listed as rejects in the tabulations resulting from that inventory (note 28, *supra*), it is obvious that at least 83 pipes marked for special hydro because of gyro areas were listed as reclaims of prior rejects. Since 267 pipes, including 94 previously accepted pipes, were marked for special hydro because of gyro areas during the May 15 inventory, it is possible that many of the previously accepted pipes were not included in the 102 gyro area reclaims. We note that one pipe (66AB50X-20, No. 2N, mfg. 4/5/65) contains a notation that the "AOK" was removed for special hydro and that the caption under the photo states it leaked at the spigot gyro ring area when tested on May 26, 1965 (p. 2, Vol. I, Exh. 40). This pipe is included in the Final Inventory of Rejected Pipe (Exh. 152, p. 32). It is probable that this is one of the previously accepted pipes which was marked for special hydro during the May 15 inventory. There is no other evidence that any of the remaining 93 previously accepted pipes were included in final rejects for gyro areas. Under the circumstances, we infer that the 102 reclaims of pipes evidencing gyro area concrete included 93 of the previously accepted pipes which

were marked for special hydro during the May 15 inventory.⁹⁶

There were a total of 229 final rejects for unconsolidated gyro area concrete, exclusive of any rejects for this reason in 175 pipes which were disposed of prior to June 20, 1966.⁹⁷ Forty-two of the final rejects for gyro areas were manufactured subsequent to May 15, 1965. It might be supposed that the number of rejections for structural reasons notwithstanding that the pipes passed hydrostatic tests (note 81, *supra*) is 44 (the difference between the 229 final rejects for unconsolidated gyro areas and 185, the number indicated as failing special hydros) (Exh. 64). However, the number rejected for this reason is almost certainly substantially less, since we find only

⁹⁶ An inference is a logical deduction or conclusion from an established fact. 21 Words and Phrases, *Inference*. It is recognized that the fact that the majority of these reclaim pipes were accepted during the period February through May 1966 (Exh. 146), could lead to an inference that most of these pipes were repaired. However, such an inference is not supported by the chief plant inspector's memorandum of March 31, 1966 (note 29, *supra*). In addition, we think this delay in acceptance could be explained as well by congestion of the test stands. We are also influenced by the fact that substantial repairs to gyro areas were not allowed after May 13, 1965.

⁹⁷ Exh. 5Q. Although the numbers of final rejects for various reasons are stated in absolute terms, our examination of the "Final Inventory of Rejected Pipe" (Exh. 152) indicates that quite frequently more than one reason was given for rejection. We count a total of 215 rejects for unconsolidated gyro areas in this inventory based on the more or less arbitrary assumption that where multiple reasons for rejection are given, the first represents the primary reason for rejection. Eighty-one of these pipes are indicated to have failed hydrostatic tests.

lant's motion (note 2, *supra*) and was offered at the hearing by appellant and accepted in evidence without objection from the Government (Tr. 480).

eight pipes rejected for gyro areas which are indicated to have passed hydrostatic tests in the Final Inventory of Rejected Pipe (Exh. 152) (which by our count contains 1,711 pipes). Only one of these rejected pipes (72A25X20, No. 6N, mfg. 11-10-65) was produced subsequent to July 1965.⁹⁸

Cen-Vi-Ro asserts that this reason for rejection is specious and was advanced so belatedly (it appears to have been clearly articulated for the first time in the project engineer's letter of May 31, 1966, note 81, *supra*) that Cen-Vi-Ro was unable to refute it.⁹⁹ Mr. Lincoln testified that the reason pipes with gyro area concrete were rejected even though the pipes passed hydrostatic tests was the requirement of the specifications that concrete be uniform throughout the pipe (Tr. 1948).

We find a requirement for uniformity in the composition and con-

sistency of the concrete as discharged from the mixer (Subpar. 67.e.(1)), but no requirement for uniformity of concrete in the pipe. Indeed, Dr. Davis testified that concrete was such a heterogeneous material that you could not make a 6 x 12-inch cylinder which was uniform throughout with the greatest of skill (Deposition, p. 58).

As we have seen, Mr. Peckworth was of the opinion that gyro area concrete did not afford a reasonable basis for questioning the soundness of the pipe.¹⁰⁰ Dr. Davis was also of the opinion that gyro area concrete would not appreciably affect the ability of the pipe to carry an external load produced by backfill (Deposition, p. 11). However, when asked, Mr. Peckworth quickly disclaimed any assumption that gyro area concrete was as strong as concrete in the remainder of the pipe and Dr. Davis had no doubt that at least some gyro area concrete was the weaker (Tr. 103; Deposition p. 11). There is no evidence that Cen-Vi-Ro experienced any difficulty in complying with compressive strength requirements which were determined by tests on cylinders made from the concrete used in pipe manufacture in accordance with

⁹⁸ Page 43, Final Inventory of Rejected Pipe, Exh. 152. A photo of this pipe indicates that it was rejected for an unapproved repair on April 18, 1966, notwithstanding that it passed the hydrostatic test (pp. 23, 113, Vol. II, Exh. 40). It appears that the unapproved repair exceeded one square foot in area.

⁹⁹ There can be no doubt that the rejection of pipes with gyro area concrete notwithstanding the pipes passed the hydrostatic test represented a change in the Bureau's position. At a meeting on May 26, 1965, Cen-Vi-Ro representatives were advised that the 404 pipes marked for special hydro during the May 15 inventory (of which we have found approximately 267 were for gyro areas) would be accepted if the pipes passed the hydrostatic test (memorandum, dated May 27, 1965, note 27, *supra*; Tr. 1708, Travel Report of R. C. Borden, dated June 9, 1965, Exh. 23). Mr. Thomas is quoted as saying that if pipes passed the hydrostatic test, the Bureau had no basis for rejection for lack of consolidation (p. 10, Notes on Meeting of July 24, 1965, note 46, *supra*). This position would seem to be implicit in paragraph 5 of the resident engineer's memorandum of May 24, 1965.

¹⁰⁰ Tr. 102, 103. He asserted that if there was any real question of structural competence, it would be a simple matter to take a core sample and test it. While the Bureau took core samples of gyro areas (core photo F, attached to Statement of Position, IBCA-718-5-68; Inspectors Daily Report, dated November 8 and 11, 1965), there is no evidence of compressive strength tests on these samples. Mr. Lincoln denied knowledge of any such tests (Tr. 1948, 1949). Apparently the Bureau would not have regarded such tests as representative (Tr. 1104, 1406).

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Subparagraph 67.e.(1) and (4) of the specifications. The project engineer testified that the p.s.i. of Cen-Vi-Ro pipe was always excellent (Tr. 2079). There is no evidence that any of these pipes were structurally weak and did not comply with the compressive strength requirements of the specifications. The record will not support a finding that any pipes with gyro area concrete which passed hydrostatic tests would not support the weight of the backfill with superimposed loads.

Dr. Davis testified that the hydrostatic test tends to show the tensile strength of the pipe (Deposition, p. 64). There is an implication (letter of May 31, 1966, note 81, *supra*), but no persuasive evidence, that unconsolidated areas on these pipes extended into or beyond reinforcing steel when chipped out for repair.¹⁰¹

The Government asserts that even if defects such as unconsolidated gyro area concrete are normally repairable in accordance with the Concrete Manual, Cen-Vi-Ro failed to take known corrective action and thus the Bureau's restrictions on otherwise allowable repairs were fully justified. The Government's position is based on the provision of the Concrete Manual: "But repairs should not be permitted when

the imperfections or damage are the result of a continuing failure to take known corrective action to eliminate the cause of the imperfections or damage." We must analyze the record in terms of the causes of gyro area concrete and the number of such defects. The Government further asserts that if the contractor ultimately finds or discovers corrective measures to eliminate a particular defect there is a known corrective action for that particular defect.¹⁰² The immediate problem with the Government's position is that the quoted sentence would have the same meaning if the word "known" were eliminated therefrom. We are not at liberty to read the word "known" out of the Manual.

It is also apparent that the Government's reading of the Manual gives little or no meaning to the words "continuing failure." The language "continuing failure to take known corrective action" could be construed as implying a willful failure to take reasonable corrective measures. There is evidence that the Bureau construed the quoted phrase as justifying the refusal to permit repair where the defects are attributable to the contractor's lack of

¹⁰¹ The record reveals that on one such pipe (66A75 No. 11N, mfg. 4/19/65), the unconsolidated area extended into and beyond reinforcing steel to a depth in excess of two inches after being chipped (photos 3704, 3705; Vol. I, p. 56, Exh. 40). This photo supports our finding (note 93, *supra*) that gyro areas in excess of one square foot were considered not repairable.

¹⁰² Brief, p. 108. For this assertion it relies principally on the testimony of Mr. Peckworth (Tr. 291). We do not find his testimony as clear cut as the Government would have us believe since he answered in the negative when asked if there was a known corrective action for every type of concrete pipe problem and his affirmative answer was in response to a question that did not contain the word "known."

quality control.¹⁰³ However, we find that a reasonable interpretation would permit the rejection of otherwise repairable pipes if the defects are shown to be attributable to the contractor's continued or prolonged failure to implement measures which it knows or as a reasonably skilled contractor should know will overcome the particular defect.¹⁰⁴

There is general agreement and Cen-Vi-Ro admits that the gyro ring phenomena was attributable to a dampening of vibration at points where the gyro rings encircled the forms in which the pipes were produced (Tr. 223, 224, 468, 469, 1130, 1854, 1855; Notice of Appeal, pp. 14, 15). Mr. Franklin admitted that increasing vibration was one of the things you think about and do to eliminate rock pockets in concrete pipe (Tr. 629). He asserted that the dampening of vibration as the cause of gyro area concrete was discovered sometime during the period January through June of 1965 (Tr. 469, 613). He also admitted that from the inception of production he considered there could be a dampen-

ing problem and a possible need for vibration isolation (Tr. 613). He testified that vibrators were added to the 20-foot spinner and vibrators were moved in an effort to cope with the gyro ring problem (Tr. 615). However, it appears that some of the experimentation with the vibrators was in an effort to solve other defects.¹⁰⁵

In any event, Cen-Vi-Ro operated for the period January 21 to July 8, 1965, with the two vibrators adjacent to the gyro rings (there were six vibrators on the 20-foot spinner) inactivated.¹⁰⁶ Mr. Lincoln testified that extra-large heavy-duty vibrators were installed adjacent to the gyro rings on November 18, 1965, and that gyro area concrete was not a significant problem thereafter (Tr. 1864). However, there is no evidence that pipes with gyro area concrete were manufactured in significant quantities after July of 1965 (Exh. 5Q), and Mr. Franklin

¹⁰³ Mr. Ryland of the Bureau's Denver office is quoted as saying that the Bureau did not intend to allow repair of major defects which were the result of lack of quality control (p. 5; Notes on Meeting, note 46, *supra*). Cf. Paragraph 13 of the Bureau's Standard Specifications for Reinforced Concrete Pressure Pipe (App's Exh. Q) which expressly empowers the contracting officer to suspend the acceptance of repaired pipes if proper quality control procedures are not being maintained.

¹⁰⁴ What evidence there is of the Bureau's interpretation of the phrase prior to the May 13 letter indicates that threats to reject pipes for failure to take known corrective action were made only when the Bureau considered the remedy to be clear (Inspectors' Daily Report, dated January 1, 1965; memorandum, dated February 18, 1965, note 45, *supra*).

¹⁰⁵ For example, fallouts were at one time attributed to excessive vibration being transmitted to the form through the gyro rings (Inspectors' Daily Reports, dated June 8 and 9, 1964). See also Inspectors' Daily Report, dated July 14, 1964, which indicates fallouts were then attributed to rubber cushions at the gyro rings absorbing vibration and states that these cushions were being removed.

¹⁰⁶ Tr. 1863, 1864; An Inspectors' Daily Report, dated January 21, 1965, states Cen-Vi-Ro was using four rather than six vibrators on 66-inch pipe. The report indicates that failure to use these vibrators was the probable cause of unconsolidated concrete in gyro areas. Mr. Lincoln testified that pipes with gyro area concrete seemed more numerous during this period. The Bureau's figures indicate that final rejects for gyro area concrete totaled nine or approximately 0.9% of pipe production in December 1964, nine or approximately 0.6% in January 1965, 12, 14 and 15 or slightly in excess of 1% during the months February through April, respectively, two or approximately 0.2% in May, eight or approximately

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insisted that other factors such as experience of the machine operator contributed to the solution of the problem.¹⁰⁷ On this evidence we would not be warranted in adopting the Government's theory that installation of the larger vibrators constituted the sole solution to gyro concrete.¹⁰⁸

Nevertheless, it cannot be denied that there is a known corrective action for factors such as experience of machine operators and in view of Mr. Franklin's testimony that increasing vibration is one of the things normally done to eliminate

rock pockets and that he considered there was a possibility of a dampening of the vibration problem from the beginning, we find that Cen-Vi-Ro is chargeable with knowledge of corrective action for gyro area concrete.¹⁰⁹ we also conclude that the production of significant numbers of pipes with unconsolidated gyro areas continued for a sufficient period of time to find that Cen-Vi-Ro continually failed to take known corrective action to reduce or eliminate gyro area concrete.¹¹⁰

Final rejects for gyro area concrete manufactured after July of 1965 did not exceed 15 (Exh. 5Q). As we have noted above, there is no evidence that gyro area concrete was a significant problem after July of 1965. Messrs. Rippon and Crane readily admitted that the quality of pipes improved substantially after May of 1965 (Tr. 1753, 2006; Travel

0.6% in June and 17 or in excess of 1% in July 1965 (Exh. 5Q). There are an additional 22 final rejects for gyro area concrete with dates of manufacture illegible which the Government nevertheless attributes to the period prior to May 15, 1965. We think we are justified in excluding the first three months of production (June, July and August 1964), when 100 of the 229 final rejects for gyro area concrete were manufactured, because Mr. McLean testified that it was very common when establishing a new plant for the manufacture of concrete or steel pipe to have a 2- or 3-month period elapse before a satisfactory product was produced (Tr. 2276, 2277).

¹⁰⁷ Tr. 618, 619. We note that after his visit to the plant in May of 1965, Mr. Borden reported that accurate machining and proper maintenance of gyro rings had minimized gyro area concrete (Travel Report, dated June 9, 1965, Exh. 23).

¹⁰⁸ In addition to the testimony of Mr. Lincoln referred to above, questions of Government counsel focused on the November 18, 1965, date (Tr. 617, 618). The date larger vibrators were installed is stated as September of 1965 in a chronology appended to Centex-I Production Quality Graph (Exh. 73). We think it significant, however, that Inspectors Daily Reports do not mention gyro area concrete as a problem after July of 1965, that the installation of larger vibrators on DC-6130 production on an experimental basis was contemplated in early August and that Cen-Vi-Ro representatives are quoted as saying that larger vibrators would be installed on the 20-foot spinner if the experiment indicated they were warranted (Inspectors Daily Report, dated August 4, 1965).

¹⁰⁹ We have not overlooked Mr. Franklin's testimony that there were so many strange conditions in concrete pipe that you could not state there was a known corrective action for rock pockets (Tr. 628, 629).

¹¹⁰ While we recognize that a "Summary of Rejects Thru 10-17-64" (Exh. 8) does not list any rejects for gyro areas, and contains only 44 rejections for miscellaneous reasons of which only 20 were manufactured on the 20-foot spinner, Cen-Vi-Ro was aware as early as July 8, 1964, that some pipes leaked at the gyro ring areas on hydrostatic test (Inspectors Daily Report, dated July 8, 1964). The record reflects that Cen-Vi-Ro was manufacturing pipes with the gyro ring vibrators not working properly as late as July 10, 1965 (Inspectors Daily Report of even date; p. 10, Notes on Meeting, note 46, *supra*). Under these circumstances, we conclude that rates of final rejects (note 106, *supra*) taken as defects, knowledge of which Cen-Vi-Ro can hardly be heard to deny, supports, if not compels, our finding of a continued or prolonged failure to take known corrective action to reduce or eliminate gyro area concrete.

Report, dated February 7, 1966, Exh. 29). Nevertheless, the criteria for pipe repair in the May 13 letter, and by implication the May 24 memorandum, were affirmed in letters from the project engineer dated May 9 (Exh. 5N, p. 26), and May 31, 1966 (note 81, *supra*), even though the former letter expressly stated that pipe of good quality was then being manufactured.¹¹¹

Mr. Rippon testified that the more numerous the repairs, the more likely it was that pipes would not be adequately repaired (Tr. 1736). It should be obvious that the Bureau could not properly refuse to allow repairs permitted by the contract upon the ground that pipes might not be adequately repaired. We find that the Bureau was not justified in refusing to permit repairs to gyro areas which were normally allowable in accordance with the Concrete Manual after July of 1965 when the incidence of pipes with such defects had been reduced to negligible numbers.

In addition to the 72-inch pipe which was rejected for an unapproved repair notwithstanding that it passed the hydrostatic test (note 98, *supra*), we have identified 12 other pipes rejected for gyro areas which were manufactured subsequent to July 31, 1965 (Exh. 152). Seven of these pipes are 66 inches

and five are 72 inches in diameter. One of these pipes (66A75, No. 16D, mfg. 1-13-66), although tested for gyro areas, appears to have actually been rejected for a damaged spigot gasket groove (Reject Certifications, Exh. 121; p. 80, Vol II, Exh. 40). The other four 66-inch pipes are all indicated to have failed more than one hydrostatic test. Three of the 72-inch pipes are listed as having failed hydrostatic tests.

One of the pipes indicated to have failed two hydrostatic tests (72A-100, No. 13D, mfg. 9-30-65) is among the pipes considered acceptable by Dr. Davis (Exh. 154). Cen-Vi-Ro has established prima facie that this pipe was properly repairable in accordance with the Concrete Manual. The Government has made no attempt to demonstrate that the contrary is true.

The Bureau did not prohibit all repairs to gyro areas, but only those where the defective concrete could not be removed by "shallow excavation." There is no evidence that any of these pipes, including the one identified by Dr. Davis, had been repaired prior to conducting the test or retests. We conclude that the pipes referred to above as having failed hydrostatic tests were not repaired. We further conclude that these pipes which were hydrostatically tested were not obviously so defective that they would not pass the test or that they needed repair. This would seem to be especially true as to unrepaired pipes which were tested more than once since they must have been considered to

¹¹¹ The project engineer's letter of May 9, 1966, which was written in response to Cen-Vi-Ro's protest of April 18, 1966 (Exh. 31), states the assumption that pipes referred to in the protest were manufactured in the early stages of production. However, Cen-Vi-Ro's reply of May 20, 1966 (Exh. 32) makes it clear that current production was also involved.

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have a reasonable chance of healing when retested. It is therefore unlikely that the Bureau's refusal to permit substantial repairs to gyro areas contributed to the above failures. Nevertheless, we have found that the Bureau improperly restricted repairs to gyro area concrete after July 31, 1965. In the nature of a jury verdict, we conclude that one 66-inch and one 72-inch pipe, in addition to the 72-inch pipe identified by Dr. Davis, would have passed the test if substantial repairs had been accomplished prior to testing.

This finding leaves for consideration three rejected pipes (66A100 X20, No. 2N, mfg. 9-28-65; 72A25, No. 6D, mfg. 4-6-66 and 72AB50, No. 16D, mfg. 6-7-66) which were produced after July 31, 1965. The 66-inch pipe is indicated as having an "unconsolidated gyro" (Final Inventory of Rejected Pipe, p. 41). The former 72-inch pipe is listed as "hydro, gyro" with no indication it was actually tested and the latter 72-inch pipe was simply rejected for "gyros" (Final Inventory of Rejected Pipe, pp. 43 and 50). Cen-Vi-Ro has not shown that these three pipes were properly repairable in accordance with the Concrete Manual.

Decision

Gyro area concrete on an undetermined number of pipes was unconsolidated to some extent and constituted a defect within the meaning of Subparagraph 67.(c) of the specifications. These uncon-

solidated areas were similar or identical to rock pockets and were thus normally repairable in accordance with the Concrete Manual. Although the Concrete Manual does not impose any size or depth limitations on the repair of rock pockets, it is clear that rock pockets are not repairable without regard to size or depth of the defective area.

The memorandum of May 24, 1965, required that all pipes exhibiting drummy areas of poor consolidation such as gyro areas be hydrostatically tested and provided that such areas could be repaired prior to testing only if the defective concrete could be removed by "shallow excavation." Shallow excavation was defined as not exceeding one inch in depth and one square foot in area. Since the Concrete Manual clearly contemplates the repair of areas exceeding one-half square foot which extend back of reinforcing steel, repairs to gyro area concrete normally permissible in accordance with the Concrete Manual were not allowed. This restriction on repair was not relaxed to any significant degree. There were 229 pipes which were final rejects for gyro area concrete.

The Government asserts that its actions were fully in accord with the Concrete Manual inasmuch as gyro area concrete was a defect resulting from Cen-Vi-Ro's continuing failure to take known corrective action. This phrase reasonably interpreted means that the contractor either knows the remedy for a particular defect, or as a reasonably

skilled contractor is chargeable with knowledge of the appropriate remedy.¹¹² We find that this interpretation is consistent with the Bureau's actions prior to the letter of May 13, 1965.¹¹³

We have found that the gyro area problem was attributable to a dampening of vibration at the points where the gyro rings encircled the forms and that Cen-Vi-Ro is chargeable with knowledge of appropriate corrective action. We have also found that gyro area concrete considered as a defect continued for a sufficient period to support a finding that Cen-Vi-Ro continually failed to take known corrective action. It follows that Cen-Vi-Ro has failed to establish that restrictions on the repair of gyro area concrete were improper prior to August 1965 when gyro area concrete ceased to be a significant problem. Of the 13 identified pipes manufactured after July 31, 1965, which were rejected for gyro areas, nine are indicated to have failed one or more hydrostatic tests. In the nature of a jury verdict, we have concluded that two of the nine (one 66-inch x 20-foot and one 72-inch) would have passed the test

had substantial repairs been permitted prior to testing. We find that these pipes were properly repairable and thus were improperly rejected.

Mr. Peckworth, who examined approximately one third of an estimated 2,000 pipes remaining in the yard at Cen-Vi-Ro's plant during a two-day period in January 1967, estimated that 50 percent of the rejected pipe should have been accepted or repaired in accordance with the specifications and Concrete Manual. We find that this estimate is lacking in specificity and is too general to be of substantial probative value. Dr. Davis examined 226 randomly selected pipes out of an unknown number remaining in the yard in March of 1967. He determined that five out of 23 pipes rejected for gyro area concrete should have been accepted with repairs. However, only two of the pipes evidencing gyro areas which he considered acceptable with repairs have been identified, one of which is indicated to be a Cen-Vi-Ro reject and one is indicated to have failed two hydrostatic tests. We find that Cen-Vi-Ro has established that the latter of these pipes was improperly rejected. However, we consider it inappropriate to apply this percentage of approximately 22 percent to the 229 rejected pipes of 66- and 72-inch diameters in several different classes, which were manufactured at widely varying periods of time, for the purpose of determining the

¹¹² We think the following statement concerning trade usage is applicable here: "By bidding to perform work * * * appellant is chargeable with the knowledge of the technology possessed by a reasonably intelligent person familiar with the field." *Ahearn Painting Contractors, Inc.*, DOTCAB No. 67-7 (March 20, 1968), 68-1 BCA par. 6949 at 52, 124.

¹¹³ Note 104, *supra*. It is well settled that the conduct of the parties may be decisive of the interpretation to be placed upon contract language. (See citations, note 43, *supra*.)

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number of repairable, rejected pipes with gyro area concrete.¹¹⁴

It is a general rule that if goods are rejected as nonconforming to contract requirements prior to acceptance, the burden is on the seller to prove conformance, while the buyer must prove nonconformance if the goods have been accepted.¹¹⁵ Except for the three pipes referred to above and with the single additional exception hereinafter noted, we hold that Cen-Vi-Ro has failed to establish that any of the 229 finally rejected pipes conformed to contract requirements or could be

made to so conform in accordance with the Concrete Manual.¹¹⁶

We turn to the propriety of the Government's rejection during the May 15 inventory of 94 previously accepted pipes manufactured on the 20-foot spinner which exhibited evidence of gyro area concrete. Although it is clear that the earlier acceptance was not the final acceptance contemplated by the contract, it does not follow that the rejections were proper.¹¹⁷ We hold that the prior acceptance established prima facie that the pipes complied with contract requirements and that in the absence of evidence to the con-

¹¹⁴ Projecting the results of inspection and tests of samples to the mass from which the samples were extracted has been held not to permit an accurate determination of the condition of the mass at an earlier time, i.e., the time of acceptance, where the mass had since been moved to varying locations. *Phoenix Steel Container Co., Inc.*, ASBCA No. 9987 (September 8, 1966), 66-2 BCA par. 5814. Dr. Davis testified that the manufacturing process for steel items such as cans is productive of more uniform results than the production of concrete pipe (Deposition, pp. 87, 92, 93).

¹¹⁵ *Miron v. Yonkers Raceway, Inc.*, 400 F.2d 112 (2d Cir., 1968), applying §§ 1-204, 2-602, 2-606, and 2-607 of the Uniform Commercial Code. Cf. *Southwest Welding & Manufacturing Company v. United States*, 188 Ct. Cl. 925-958 (1969) and ASBCA decisions cited at footnote 7 thereof. *Southwest Welding & Manufacturing Co.* involved prior versions of Standard Form 23-A (probably 1953) and it is clear that there had been an acceptance within the meaning of the Inspection and Acceptance Clause. We note that the ASBCA has declined to approve what it characterized as dictum in one of the cases referenced in the cited footnote, *Hordeman-Monier-Hutcherson*, ASBCA No. 11785 (March 11, 1967), 67-1 BCA par. 6210, that the Government has the burden of persuasion that rejected items did not conform to contract requirements. See *Fishback & Moore International Corp.*, ASBCA No. 14216 (March 16, 1971), 71-1 BCA par. 8775, affirmed on reconsideration (September 17, 1971), 71-2 BCA par. 9081.

¹¹⁶ In *Joseph Sternberger, Trustee in Bankruptcy for Spenco, Inc. v. United States*, 185 Ct. Cl. 528 (1968), a claim for costs resulting from the improper rejection of test samples was held to have been properly denied where there was no probative evidence of the number of samples improperly rejected.

¹¹⁷ Paragraph (a) of this clause (Clause 10 of the General Provisions, Standard Form 23-A, April 1961 Edition) provides in pertinent part: "To the extent specified by the Contracting Officer at the time of determining to make off-site inspection or test, such inspection or test shall be conclusive as to whether the material involved conforms to contract requirements." This provision was supplemented by Par. 26, entitled "Materials," of the Special Conditions which provides in part: "b. Inspection of materials—Materials and equipment, furnished by the contractor which will become a part of the completed construction work, shall be subject to inspection in accordance with Clauses 9 and 10 of the General Provisions at any one or more of the following locations as determined by the contracting officer; at the place of production or manufacture, at the shipping point, or at the site of the work. * * *." Since the record reflects that pipes were inspected at the plant and also at the laying site, it is evident that the prior acceptance was not final. Cf. *Merritt-Chapman & Scott Corporation v. United States*, 178 Ct. Cl. 883 (1967) (actions of parties taken as establishing that off-site inspection was not intended to be final).

trary Cen-Vi-Ro has carried its burden of proof that these pipes conformed to contract requirements. In instances where the Government has overcome the effect of prior acceptance, the evidence has established nonconforming materials or workmanship.¹¹⁸

The evidence establishes that the "AOK" on a pipe manufactured on April 4, 1965, was removed and the pipe hydrostatically tested. This pipe is included in the final inventory of rejects. There is no evidence that any of the other 93 previously accepted pipes were included in final rejects for gyro areas. Accordingly, we conclude that these 93 pipes were improperly rejected in the May 15 inventory. Our finding that Cen-Vi-Ro failed to take corrective action to reduce or eliminate gyro area concrete prior to August 1, 1965, does not justify the rejection of conforming pipes. It follows that Cen-Vi-Ro is entitled to an equitable adjustment for the interim wrongful rejection of these 93 pipes. Cen-Vi-Ro's claim for the cost of conducting hydrostatic tests on those pipes is considered *infra* under the heading of "Testing Criteria."

The foregoing findings make it necessary that we consider the propriety of the rejection of only one of the eight identified pipes which

passed hydrostatic tests. This is a 72-inch diameter pipe manufactured on November 10, 1965, which was rejected for an "unapproved repair" (note 98, *supra*). It appears that the repaired area exceeded one square foot. The propriety of this limitation is considered *infra* under the heading of "Fallouts." The evidence does not support the Government's stated reason for the rejection of pipes with gyro area concrete notwithstanding the pipes passed hydrostatic tests, that is, that the pipes were structurally weak. The evidence does support the conclusion that Cen-Vi-Ro had no difficulty complying with compressive strength requirements of the contract. We find that the rejection of this pipe was improper.

The appeal as to "drummy concrete" is sustained as to disruption costs associated with the interim wrongful rejection of 93 pipes, as to one repaired 72-inch and three unrepaired pipes (two 72-inch and one 66-inch x 20-foot pipe which were improperly rejected) and is otherwise denied. The amount of the equitable adjustment will be determined in a subsequent portion of this opinion.

Repair of Insignificant Air Holes

Subparagraph 67.h.(4)(g) of the specification provides that "The surfaces of the bell and spigot in contact with the gasket, and adjacent surfaces that may come in contact with the gasket within a joint movement range of three-fourths inch, shall be free from air holes, chipped

¹¹⁸ A. J. Bumb, Administrator, IBCA-475-1-65 (June 30, 1965), 65-2 BCA par. 4944; W. L. Spruill and Company, ASBCA No. 14390 (June 12, 1971), 71-2 BCA par. 8930 and cases cited. Cf. *Pams Products*, ASBCA No. 15847 (March 31, 1972), 72-1 BCA par. 9401 (contractor entitled to equitable adjustment where Government failed to prove that work ordered corrected by contracting officer was nonconforming to contract requirements).

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or spalled concrete, laitance or other defects, except that individual air holes may be repaired as provided in Subparagraph *j.(2)*." Cen-Vi-Ro asserts and Mr. Peckworth testified (Tr. 108) that all concrete has air holes. Cen-Vi-Ro contends that the quoted provisions, properly interpreted, requires only that air holes affecting the water tightness, serviceability or structural strength of the pipe be repaired (Exh. 5M, p. C5; Notice of Appeal, pp. 18, 19). Cen-Vi-Ro states that Bureau inspectors did not exercise any practical judgment and insisted that all air holes be pointed or filled because the specification did not limit the size of air holes to be repaired. Cen-Vi-Ro alleges that in order to expedite production, it was forced to coat the entire bell gasket bearing surface with epoxy.

In a letter dated November 8, 1965 (Exh. 5N, p. 34), Cen-Vi-Ro protested the requirement that all minor holes in the bells be filled with epoxy or other patching material and requested a ruling that small holes inherent in the spinning process were not of a size to cause joint leakage and thus were not defects requiring patching. The project engineer replied to Cen-Vi-Ro by letter dated December 6, 1965 (Exh. 5N, p. 21), stating that observations and experience have shown that some pipes could be accepted without repairs to the bell surfaces, but that the majority of the bells required minor work. The letter expressed agreement with Cen-Vi-Ro's position that all bells did not

require repair, stated that Cen-Vi-Ro had informally been so advised on several occasions and asserted that the practice of coating the entire bell surface with epoxy was not a requirement of the Bureau, but a production expedient adopted by Cen-Vi-Ro.

Mr. Thomas denied that the Bureau required the repair of small air holes in the gasket area (Tr. 1423).

Mr. Herrera testified that Bureau inspectors required the repair of air holes a quarter of an inch or larger in diameter which he referred to as "bug holes" (Tr. 822). He considered that many of these repairs were unnecessary because a certain number of "bug holes" was normal in Cen-Vi-Ro pipe, and because it had been proved that the large rubber gasket would effect a seal (Tr. 823). However, he admitted directing Cen-Vi-Ro employees to coat the entire bell surface partly because of the number of holes, but mainly because Cen-Vi-Ro did not have personnel sufficiently experienced to determine which holes require repair and which did not (Tr. 806, 807, 829). An Inspectors Daily Report, dated October 7, 1965, indicates that Mr. Herrera was not in favor of eliminating epoxy in the bells. An Inspectors Daily Report, dated November 8, 1965, recommends that Cen-Vi-Ro have a qualified man on each shift to determine which bells should be repaired.

Decision

The record establishes that air holes are normal in concrete pipe

manufactured by the Cen-Vi-Ro process and that Bureau inspectors required the repair of air holes in the bell area which were a quarter of an inch or larger in diameter. Since the specification required that bell and spigot areas in contact with the gasket within a joint movement range of three-fourths of an inch be free from air holes, we cannot say that this requirement was erroneous or unreasonable. The record further establishes that the practice of coating the entire bell surface with epoxy was initiated by Cen-Vi-Ro principally because it lacked personnel with sufficient expertise to determine which air holes required repair and which did not. It follows that the claim for repair of insignificant air holes must be and hereby is denied.

Longitudinal and Circumferential Cracks

Subparagraph 67.j.(2) of the specification provides, *inter alia*, that the pipes be free from fractures. Mr. Peckworth testified that there are cracks in all concrete pipe and that while all fractures were cracks, the converse was not true (Tr. 212, 213, 218). He defined a fracture as a crack where there had been movement (Tr. 212, 244, 245, 296). The Government has not even attempted to rebut this testimony. Indeed, we consider that any such attempt would be futile since the Concrete Manual clearly does not regard fractures and cracks as identical. The Board finds that the contract may not be construed as pro-

hibiting all cracks in the pipe. However, even Cen-Vi-Ro admits that extensive longitudinal and circumferential cracks should not be allowed (letter of June 10, 1965, note 53, *supra*).

Cen-Vi-Ro's basic contention is that the specification through the Concrete Manual specifically allows the repair of "fractures or cracks passing through the shell" and that such repairs are prohibited only on breaks entirely through the shell on gasketed spigots which extend more than four inches around the circumference under the gasket or which are the result of "continuing failure to take known corrective action." In addition, Cen-Vi-Ro asserts that the requirement that pipes with such cracks be tested prior to repair constituted a unilateral change. We have previously agreed with Cen-Vi-Ro's contention that the contracts contemplated that repairs in accordance with the Concrete Manual were permissible.

Mr. Lincoln testified that the Bureau in some instances prior to May 1965, allowed cracks extending entirely through the pipe wall to be repaired.¹¹⁹ He stated that many of these pipes leaked and that the repaired area of the pipe extended under hydrostatic tests (Tr. 1882,

¹¹⁹ Tr. 1882. He described the repair process as follows:

"* * * a small 'v' was chipped out on the inside and outside of the crack in the pipe wall and the repair made in that area" (Tr. 1883). He stated there was no way of telling whether the epoxy entirely filled the crack. Although the Sixth Edition of the Concrete Manual does not provide for epoxy repairs, the Seventh Edition, which was originally issued in 1963 (Tr. 2086), does provide for such repair.

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1883). The record does not indicate the number of such repaired pipes. He further stated that the Bureau did not consider such repairs to be safe and that such repairs were not allowed after May 13, 1965. Mr. Thomas expressed the opinion that proof Cen-Vi-Ro could satisfactorily repair longitudinal and circumferential cracks was lacking (Tr. 1423).

The Tentative Instructions to Concrete Inspectors, dated May 7, 1965 (note 26, *supra*), provided that all pipes having circumferential cracks in the spigot of 12 inches or more should be rejected and that all pipes with longitudinal cracks must be hydrostatically tested. These instructions were superseded by the May 13 letter which provided that all pipes having circumferential cracks which extend through the pipe wall would be rejected because of the possibility of such cracks opening further due to beam action from handling and backfill loads. The memorandum of May 24, 1965, provided for hydrostatic testing to determine if the crack extended through the pipe wall. The May 13 letter also provided that all pipes having longitudinal cracks which extended for substantially the full length of the pipe would be rejected and that all pipes having shorter longitudinal cracks must be hydrostatically tested. As we have seen, "substantially" was subsequently defined as over one-half of the length of the pipe (memorandum of March 31, 1966, note 29, *supra*).

It appears that 64 pipes were re-

jected for circumferential cracks and five for longitudinal cracks prior to the May 15 inventory (Exh. 59). The tabulation, dated April 18, 1967 (Exh. 60), indicates that 55 pipes were rejected for circumferential cracks and 53 for longitudinal cracks during the May 15 inventory. A tabulation attached to the memorandum, dated May 27, 1965 (note 27, *supra*), reflects that during the May 15 inventory 84 pipes were rejected for circumferentially cracked spigots of which approximately 50 percent had been repaired and that 56 were rejected for longitudinal cracks of which most had been repaired. As a result of the May 15 inventory 82 repaired and previously accepted pipes were no longer acceptable (tabulation enclosed with Special Report, note 24, *supra*). The Board finds that these 82 repaired and previously accepted pipes were pipes with longitudinal and circumferential cracks. We further find that 42 of these pipes had repairs to circumferential cracks in the spigot and that 40 had repairs to longitudinal cracks.

There can be no doubt that the May 13 letter constituted a change to the Bureau's prior practice insofar as previously accepted pipes were now rejected and insofar as it precluded repair of any pipes with longitudinal or circumferential cracks. We have found that the Concrete Manual cannot be interpreted as a mandatory requirement that all of the listed defects be repaired without regard to extent. Messrs. Peckworth and Davis agreed that

all cracks in concrete pipe were not repairable (Tr. 221; Deposition, p. 52). Since Cen-Vi-Ro agrees that extensive longitudinal and circumferential cracks should not be allowed, we cannot say that the rejection of pipes with longitudinal cracks extending over one-half of the length of the pipe was unreasonable. However, the flat prohibition on the repair of any circumferential cracks cannot be accepted as reasonable since it constitutes a negation of the Concrete Manual except as to breaks entirely through the shell and which extend into or beyond gasket bearing area and extend more than four inches around circumference under the gasket.

The Government again relies on the results of special hydrostatic tests as proof of substandard pipe manufactured by Cen-Vi-Ro. The Hydrostatic Test Study (Exh. 64) reflects that 64 out of 82 or approximately 78 percent of 20-foot pipes tested for longitudinal cracks failed the special hydrostatic test. The study also reflects that 30 of 84 or approximately 35.7 percent of 20-foot pipes tested for circumferential cracks failed the test. The tests for circumferential cracks were for cracks in the barrel. The Study indicates that 82 of 163 or approximately 50.3 percent of 16-foot pipes tested for longitudinal cracks and 21 of 69 or approximately 30.4 percent of 16-foot pipes tested for circumferential cracks failed hydrostatic

tests.¹²⁰ Of 270 16-foot pipes tested for pulled or cracked spigots, 123 or approximately 45.5 percent failed the tests. We accept these failure rates as prima facie valid insofar as the method of conducting the tests is concerned, in the absence of evidence to the contrary.

Cen-Vi-Ro asserts that the results of special hydro tests are distorted by the Bureau's refusal to allow repairs prior to testing. Although there is understandably no evidence of the number of pipes failing hydrostatic tests which would have passed had repairs been permitted prior to testing, it would appear that there is merit to this contention. Indeed, one of the Bureau's reasons for refusing to permit repairs to cracked pipes prior to testing was concern that repairs might falsely represent the competence of the pipe.¹²¹

However, Dr. Davis testified that with proper workmanship an epoxy grout repair was almost certain to be 100 percent effective and that if the crack was properly grouted, the likelihood of any failure in the

¹²⁰ The Study does not include the results of special hydrostatic tests on 16-foot pipes which were tested at lower heads than for which the pipes were manufactured.

¹²¹ Letters of July 8, and 19, 1965, May 9, 17, and 31, 1966 (Exh. 5N, pp. 18, 19, 20, 26, 27 and 30). In a letter, dated November 17, 1965 (Exh. 27), Cen-Vi-Ro referred to the Bureau's practice of rejecting pipes when fractures or cracks were determined to extend through the shell and asked for a written ruling if the practice was to continue. The project engineer's reply, dated December 3, 1965 (Exh. 5N, pp. 35, 36), reaffirmed the criteria in the May 13 letter and stated that the competence of any repair of a crack through the pipe wall was questionable.

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crack itself was extremely remote (Deposition, pp. 71, 72). Mr. Rippon is quoted as saying “* * * that most pipe (sic) with epoxy repairs would probably pass the hydrostatic test.” (p. 9, Notes on Meeting, note 46, *supra*.) It is Cen-Vi-Ro's position that a properly repaired pipe is no longer defective but in the words of the Manual has been “made acceptable” (Brief, p. 9). Dr. Davis testified that a properly repaired pipe may be as good as an unrepaired pipe and should pass specification requirements (Deposition, p. 89). Mr. Peckworth stated that a properly repaired pipe should give as good or better service than an unrepaired pipe (Tr. 119).

On brief, the Government characterizes the above testimony as “patently illogical” and asserts that repair introduces crucial uncertainties as to the integrity of the pipe. There are several answers to these assertions. The first is that the contract contemplates that repairs in accordance with the Concrete Manual were permissible.¹²² The second answer is that the Manual provides for hydrostatic tests on each repaired pipe on which major repairs have been effected and for occasional tests on pipe units having lesser repairs for the obvious pur-

pose of testing the efficacy of the repair (Par. (h), Sec. 137, p. 358), and at least tending to remove the uncertainties of which the Government now complains. Mr. Murray, who had 29 years of experience in concrete pipe production, testified that one could never be certain about the wall of any pipe (Tr. 953, 954). It appears that the Bureau desired a standard of certainty as to pipe acceptability not contemplated by the contract. We accept Cen-Vi-Ro's contention that a properly repaired pipe is no longer defective and that the Bureau's concern for the integrity of the pipe was not a proper basis for refusing to permit allowable repairs prior to testing.¹²³

Our examination of the Final Inventory of Rejected Pipe (Exh. 152) reveals 108 pipes for which the primary reason for rejection appears to have been longitudinal cracks which are also indicated to have failed hydrostatic tests. Fifteen of these pipes are indicated to have more than one defect. Of the remaining 93 pipes, seven are 54 inches, six are 60 inches, 53 are 66 inches (including ten 66-inch x 16-foot), and 27 are 72 inches in diameter. One pipe (72AB50X20, No. 8D, mfg. 10-18-65) was rejected be-

¹²² We think it significant that the Bureau's Standard Specifications For Reinforced Concrete Pressure Pipe, dated February 1, 1969 (App's Exh. Q), although providing for the rejection of many pipes which are normally repairable under the Concrete Manual, nevertheless, provides for substantial repairs, *e.g.*, fallouts of less than two square feet and imperfections of less than 45° in gasket bearing areas of bell or spigot.

¹²³ We have not overlooked Mr. Rippon's testimony that numerous large repairs would endanger the serviceability of the line (Tr. 1736) and Mr. Peckworth's statement that numerous large repairs to concrete pressure pipe are not to be tolerated (Tr. 284). However, we have rejected the concept of major repair used by the Government, in compiling its schedule of the number of repaired pipes (note 56, *supra*), and in the absence of some standard by which to consider “numerous and large” we consider this testimony unpersuasive.

cause of a four-foot longitudinal crack notwithstanding that it passed the hydrostatic test. Another pipe (66AB50X20, No. 5N, mfg. 6-30-65) developed longitudinal cracks when tested, was repaired and again failed the test. There is no other evidence of the results of hydrostatic tests on particular repaired pipes.

We find 42 pipes in the Final Inventory of Rejected Pipe for which the primary reason for rejection appears to have been circumferential cracks which are also indicated to have failed hydrostatic tests. Fifteen of these pipes have more than one defect. Of the remaining 27 pipes, two are 54 inches, ten are 60 inches, 13 are 66 inches (including four 66-inch x 16-foot) and two are 72 inches in diameter. Two additional pipes (66AB50X16, No. 1N, mfg. 11-10-65 and 72AB50, No. 4N, mfg. 5-31-66) were rejected for circumferential cracked spigots even though they passed hydrostatic tests. Two pipes (60AB50, No. N1, mfg. 8-28-64 and 54AB50, No. 2D, mfg. 10-21-65) leaked at circumferential cracks in the spigot after being repaired (Reject Certifications, note 88, *supra*). Only the former pipe is included in the Final Inventory of Rejected Pipe (Exh. 152, p. 9).

The Government again alleges that Cen-Vi-Ro continually failed to take known corrective action to eliminate the causes of longitudinal and circumferential cracks. We have previously defined this phrase and have found that the rec-

ord supports the finding that Cen-Vi-Ro continually failed to take known corrective action to reduce or eliminate gyro area concrete prior to August 1, 1965.

The record reflects and Cen-Vi-Ro concedes that circumferential cracks, most of which appeared in the spigot,¹²⁴ occurred almost entirely during the stripping of the form.¹²⁵ We are unable to determine from the record the causes of circumferential cracks in the barrel. Mr. Lincoln attributed circumferential cracks in the spigot to improper removal of the spigot-forming ring and to the fact that the forms, through repeated use, became out of shape causing tension on the spigot. It would, of course, seem that there was a known corrective action for circumferential cracks in the spigot, namely, proper removal of the forms.¹²⁶ However, even if circumferential cracks be attributed ex-

¹²⁴ Pars. 28 and 34 of Findings of Fact. The contracting officer considered circumferentially cracked spigots under the heading of bell and spigot defects. If his finding that only eight of the final rejects for circumferential cracks had cracks in the barrel is accurate, at least 43 pipes tested for circumferential cracks in the barrel and which initially failed hydrostatic tests, were ultimately accepted (Exh. 64).

¹²⁵ Tr. 1259, 1260, 1890; Dwg. No. 662-525-1860, Exh. 70; Deposition of Dr. Davis, p. 70; Statement of Cen-Vi-Ro's Position, dated August 9, 1966, Exh. 5L, p. 8; Claim, Exh. 5M, p. C11.

¹²⁶ Deposition, p. 76. The specification, Subparagraph 67.e.(2), provides in part "The form and end ring shall be so constructed that the pipe when manufactured will have circular and cylindrical inner surfaces, and (sic) so that they may be stripped from the pipe without damage to the pipe or its surfaces. Forms shall be cleaned and oiled before filling. Defective forms, end rings, and gaskets shall be adequately repaired or discarded."

clusively to human error in removal of the forms, it is clear that it would be unrealistic to expect the complete elimination of such cracks. Even the Government's expert witness, Mr. McLean, who did not favor any repairs to concrete pressure pipe, conceded that some repairs were to be expected (Tr. 2255, 2256, 2341, 2342). The record reflects that Cen-Vi-Ro manufactured 11 final rejects for circumferential cracks in September 1964 (for reasons previously stated, note 106, *supra*, we exclude the first three months of production), six in October, three in November, and only one in December and that during the so-called crisis period from January through April 1965, final rejects for circumferential cracks averaged approximately four a month or approximately 0.3 percent of pipe production (Exh. 5Q). Even if we were to treat the number of circumferential cracks reflected in these rates as defects, we would not be warranted in determining that this rate of defects constituted a continuing failure to take corrective action even if the remedy be regarded as obvious. It would appear that this is the type of occasional defect which even under the Government's theory was intended to be repairable under the Manual.

We recognize the Government's position that final rejects were merely the tip of an iceberg and that there were literally hundreds of other pipes with similar defects which were accepted with or without repairs. The 271 pipes which were subjected to special hydro-

static tests for cracked or pulled spigots of which 124 failed, lends some support to the Government's position (Exh. 64). However, there is evidence that pipes subjected to the special hydrostatic test were listed under the defect for which the pipe failed, which was not necessarily the reason for the test (Tr. 1562). We note that the 126 final rejects for circumferentially cracked spigots were only two more than those indicated to have failed the test which makes it unlikely there were numerous other pipes with similar defects. As to those pipes which passed the test, the Government concluded that cracks in such pipes were not extensive and accepted the pipes without repair (Par. 32, Findings of Fact). We conclude that the evidence does not support a finding that Cen-Vi-Ro continually failed to take known corrective action to eliminate circumferential cracks in the spigot.

The Government argues that all defects must be considered in determining the question of failure to take known corrective action. We decline to accept this argument. First, we do not consider the phrase "continuing failure to take known corrective action" is equivalent to a provision allowing the rejection of otherwise repairable pipes for failure to maintain proper quality control procedures (note 103, *supra*). Second, there does not appear to be a relationship between circumferentially cracked spigots and other defects. There may, of course, be a known corrective action for a

defects or at least not one shown by the record.¹²⁷ We note that the extremely high rate of final rejects manufactured during February and March 1965 (15.8 and 15 percent, respectively), is due primarily to cracking and flaking interiors, the extent of which was not discovered until the May 15 inventory (Tr. 1912).

As to longitudinal cracks, there were only five rejects for this reason prior to May 15, 1965 (Exh. 59). Final rejects for longitudinal cracks manufactured in September 1964, were slightly in excess of 0.5 percent of pipe production, in excess of one percent in October, approximately 0.3 percent in November, approximately 0.8 percent in December, in excess of one percent in January 1965, approximately 1.8 percent in February, about one percent in March and approximately two percent of pipe production in April 1965.¹²⁸ These are, of course, substantial rates of rejections which continued for a substantial period and clearly placed Cen-Vi-Ro on notice that corrective action was necessary.

The record indicates that some longitudinal cracks developed during hydrostatic tests and in han-

dling (Tr. 1875, 1883, 1971). However, Mr. Lincoln testified that he did not know the causes of longitudinal cracks in the barrel,¹²⁹ and we are unable to determine from the record the cause or causes of this defect.¹³⁰ While, it is, of course, the contractor's responsibility to find and eliminate the causes of such cracks, we cannot, on this record, find that there was a known corrective action for longitudinal cracks which Cen-Vi-Ro failed to take. Dr. Davis' testimony that there was a cure for most of the known defects in concrete (Deposition, p. 63), which was supported by Mr. McLean (Tr. 2263), does not persuade us to the contrary.

Even if our finding that the record does not support the Government's contention that Cen-Vi-Ro continually failed to take known corrective action to eliminate the causes of longitudinal and circumferential cracks had been otherwise, there is ample evidence to support the conclusion that the Bureau's refusal to permit repairs to pipes with circumferential cracks and pipes with longitudinal cracks extend-particular defect but not for other

¹²⁷ There is evidence that action to correct one defect could result in other defects. For example, Mr. Murray's memorandum, dated July 8, 1965 (Cen-Vi-Ro Correspondence), which is quoted in detail *infra* in connection with the claims on DC-6130, indicates that if the mix was sufficiently dry to stop slump or fallouts, the pipes had rocky bells and that if the mix was wet enough for good bells, slump or fallouts resulted.

¹²⁸ Exh. 5Q. There are an additional 15 pipes with dates of manufacture illegible which the Government attributes to the period prior to May 15, 1965.

¹²⁹ Tr. 1879. There is evidence that some short longitudinal cracks in the early period of production were attributable to rigid supports on tunnel cars used to transport pipes through steam tunnels (Tr. 1875-1877); Dwg. No. 662-525-1581, Exh. 69). This cause for cracking was largely eliminated through use of a flexible, cable type support.

¹³⁰ Although Mr. Lincoln indicated that a high incidence of longitudinal cracks was attributable to the type of "chair" used to separate the form from the cage (Tr. 1882; Exh. 68), on cross examination he stated that a review of Bureau records did not support the conclusion that longitudinal cracks were attributable to the chairs (Tr. 1973).

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ing less than one-half the length of the pipe was unrelated to Cen-Vi-Ro's alleged failure to take known corrective action. It is true that the May 13 letter stated the Bureau's view that corrective measures to eliminate the causes of imperfections had not been accomplished to date. It is also true that the project engineer's letter of December 3, 1965 (note 121, *supra*), stated that as long as pipes having cracks completely through the wall came off of the production line at rather frequent intervals, it would be necessary to reject such pipe. However, the May 13 letter stated that all pipes with circumferential cracks extending through the pipe wall would be rejected because the possibility of the cracks opening further due to beam action was too great to allow the use of such pipe. The determination of whether the crack extended through the pipe wall was made by a hydrostatic test. The May 13 letter also provided for the hydrostatic testing of all pipes with short longitudinal cracks (subsequently defined as less than one-half the length of the pipe) prior to any repairs being effected. We have found that this policy was due to the Bureau's concern that repairs might falsely represent the competency of the pipe. The Bureau did not significantly relax these restrictions,¹³¹ but in fact repeatedly re-

affirmed them notwithstanding an awareness that the quality of the pipe had improved and that Cen-Vi-Ro was producing pipes of good quality (Tr. 1753; Travel Report, dated February 7, 1966, Exh. 29; letter of May 9, 1966, note 121, *supra*). We see no escape from the conclusion that concern for the integrity of any repair to pipes with longitudinal and circumferential cracks was the moving cause for the restrictions on such repairs.

There were 64 rejects for circumferential cracks prior to May 15, 1965 (Exh. 59), and 72 of the 134 final rejects for circumferential cracks are indicated to have been manufactured after May 15, 1965 (Exh. 5Q). Accordingly, it would appear that the 55 pipes rejected for circumferential cracks in the May 15 inventory plus at least two of the prior rejects must have been accepted. However, the Summary of Pipe Units Reclaimed (Exh. 146), which purportedly represents the disposition of all pipes rejected during the May 15 inventory which were subsequently accepted (note 95, *supra*), reflects that only twenty pipes rejected for circumferential cracks in the May 15 inventory were reclaimed. We have previously found that the total of pipes rejected during the May 15 inventory (Exh. 60) does not include 404 pipes marked for special hydro. It ap-

¹³¹ Pipes with not more than two longitudinal cracks other than in bell or spigot gasket areas which did not exceed two foot in length and which did not extend under pressure were acceptable with repair and without rehydro after September 1, 1965. After December 14,

1965, pipes with circumferential cracks on outside in spigot gasket groove did not require special hydro if the cracks were not visible inside the pipe (Inspectors Daily Reports, dated September 1 and December 14, 1965).

pears, nevertheless, that a substantial number of such pipes are included in the summaries which purport to represent the disposition of all pipes actually rejected in the May 15 inventory (Exh. 146, App's Exh. C). As will appear hereinafter, the effect of this inconsistency appears primarily to have concealed the actual number of reclaims for fallouts and rocky bells. Of course, it also makes more uncertain conclusions as to the disposition of actual rejects during the May 15 inventory. Nevertheless, except as otherwise noted, we accept the Summary of Pipe Units Reclaimed (Exh. 146) as accurate.

We have found that 55 pipes rejected for circumferential cracks in the May 15 inventory included 42 repaired and previously accepted pipes. Prima facie these 42 pipes complied with contract requirements. A logical conclusion might be that these pipes were subjected to hydrostatic tests and that twenty passed and the balance failed. However, there is no evidence that pipes with repairs to circumferential cracks were tested or accepted after the May 13 letter. Indeed, it would appear that to have accepted such pipes would have been contrary to the May 13 letter (which provided for the rejection of all pipes with circumferential cracks extending entirely through the shell) or the May 24 memorandum (which provided for the testing of all pipes upon which circumferential cracks appeared only on the outside of pipe before repairs were accomplished).

In view thereof, we conclude that the twenty reclaims of rejects in the May 15 inventory for circumferential cracks were other than any of the 42 repaired pipes. In any event, there is no evidence to the contrary. Although no precise determination of the diameters of these 42 pipes is possible, based on a comparison of the sizes of pipes rejected for circumferential cracks in the May 15 inventory (Exh. 22) with the numbers of each size which were final rejects for such reason (Exh. 5R), we find that two of these pipes were 72 inches, two were 66 inches, twenty were 60 inches and eighteen were 54 inches in diameter. We further find that the rejection of these pipes was improper.

As we have seen, there were five rejects for longitudinal cracks prior to May 15, 1965 (Exh. 59). There were an additional 53 rejections for longitudinal cracks during the May 15 inventory of which forty had been previously repaired and accepted. Prima facie these forty pipes complied with contract requirements. Of the 276 final rejects for longitudinal cracks, 129 were manufactured subsequent to May 15 (Exh. 5R). Twenty-eight of the rejects for longitudinal cracks during the May 15 inventory are listed as reclaims (Exh. 146). Pipes with repairs to short longitudinal cracks accomplished prior to May 13, 1965, were subjected to hydrostatic tests in accordance with the May 24 memorandum. There is no evidence of how many of the forty repaired and accepted pipes had cracks which ex-

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tended less than one-half of the length of the pipe. A photo indicates that one pipe (60AB50, No. 6N, mfg. 2-4-65) had a repair to a longitudinal crack which extended the full length of the pipe (p. 22, Vol. IV, Exh. 40). There is no evidence that this pipe had been accepted. Since it is the Government that is representing that the 28 reclaims are pipes rejected, as distinguished from marked for special hydro in the May 15 inventory, we decline to speculate on how many, if any, of these reclaims were marked for special hydro during the May 15 inventory. If the reclaims are in fact among the 53 pipes rejected during the May 15 inventory of which 40 had been repaired and accepted, it follows that at least fifteen of the reclaims were previously accepted pipes. We so find. We further find that the rejection of these fifteen pipes was improper.

Of the identified pipes considered acceptable by Dr. Davis, fourteen had longitudinal cracks and six had circumferentially cracked spigots (Exh. 154). Nine of the former pipes are indicated to have failed one or more hydrostatic tests. Three of the pipes failing hydrostatic tests had more than one defect and one pipe listed as failing the test had a full length crack. One other pipe which was not tested had a full length crack. Of the remaining nine pipes, four are 54 inches in diameter and five are 66 inches in diameter. Three of the pipes rejected for circumferential cracks in the spigot failed the hydrostatic tests. One of

these pipes had more than one defect. Of the remaining five pipes, three are 54 inches in diameter, one is 66 inches and one is 72 inches in diameter.

While we have refused to accord substantial probative value to Dr. Davis' findings insofar as projecting the results of his examination to rejected pipes not identified,¹³² we conclude that Cen-Vi-Ro has established prima facie that pipes not shown to have extensive cracks, *e.g.*, longitudinal cracks which extended over one-half of the length of the pipe and not shown to have multiple defects, were properly repairable in accordance with the Concrete Manual and thus improperly rejected. The Government has made no attempt to demonstrate that these pipes could not properly be repaired in accordance with the Concrete Manual.

Decision

The contract required that the pipes be free from fractures. However, fractures and cracks are not

¹³² The Government cites an additional reason for questioning the results of the Davis and Peckworth inspections, namely, that there is no evidence that pipes examined by them had been presented to the Bureau. We note that 16 of the 58 pipes identified as acceptable by Dr. Davis (Exh. 154) were apparently not included in the Final Inventory of Rejected Pipe (Exh. 152), which presumably means that these were acceptable but surplus pipes. However, we can identify only two 20-foot pipes (66 AB 50, mfg. 12-17-64; 66A 100, No. 11D, mfg. 8-23-65) and one 16-foot pipe (60 AB 50, No. N13, mfg. 2-2-65) on the list of 58 pipes which are also on the list of acceptable but surplus pipes (Exh. 37). We conclude that it is highly unlikely that any substantial number of pipes examined by Mr. Peckworth and Dr. Davis had not been presented to the Bureau.

identical and the contract may not be construed as requiring that the pipes be free of all cracks.

The Concrete Manual provides that fractures or cracks extending entirely through the shell are normally repairable except for cracks through the shell of gasketed spigots which extend into or beyond the gasket bearing area and more than four inches around the circumference under the gasket and except where the defect is attributable to a continuing failure to take known corrective action. Although the Bureau allowed some pipes with cracks extending entirely through the shell to be repaired prior to May 13, 1965, such repairs were not permitted after that date. Pipes with longitudinal cracks which extended more than one-half of the length of the pipe were rejected, as were all pipes with circumferential cracks extending through the pipe wall irrespective of size. Pipes with longitudinal cracks which extended less than one-half of the length of the pipe were subjected to hydrostatic tests and all pipes with circumferential cracks were hydrostatically tested to determine if the crack extended through the pipe wall. If the pipes passed the tests, it was concluded that the cracks were minor and the pipes were accepted without repairs.

Since the evidence establishes and Cen-Vi-Ro admits that whether longitudinal and circumferential cracks are repairable depends upon the magnitude and extent of the

crack, we cannot say that the rejection of pipes with longitudinal cracks extending over one-half of the length of the pipe was unreasonable. The requirement that pipes with lesser longitudinal cracks be hydrostatically tested prior to any repairs and rejected if they failed the test was clearly contrary to the Concrete Manual. Left to his own devices the project engineer would apparently have permitted the repair of substantial circumferential cracks in the barrel of the pipes and cracks of 12 inches or less in the spigot. The requirement that all pipes with circumferential cracks be hydrostatically tested without repairs and rejected if they failed the test was clearly contrary to the Concrete Manual. These restrictions were not relaxed in any significant degree.

The evidence will not support a finding that Cen-Vi-Ro continually failed to take known corrective action to eliminate the causes of longitudinal and circumferential cracks. It indicates rather that the Bureau imposed the restrictions because of concern for the integrity of any repairs. There were 134 final rejects for circumferential cracks (eight of which had cracks in the barrel) and 276 final rejects for longitudinal cracks.

The Government relies on the high percentage of pipes assertedly tested for longitudinal and circumferential cracks which failed hydrostatic tests as proof that pipes manufactured by Cen-Vi-Ro did not conform to the specifications. Cen-Vi-Ro asserts that these test results

are distorted by the Bureau's refusal to permit repairs permissible under the Concrete Manual prior to conducting the test. We conclude that this contention must be sustained. We have identified 108 pipes in the Final Inventory of Rejected Pipe which are indicated to have failed hydrostatic tests and for which the primary reason for rejection appears to have been longitudinal cracks. We have also identified 42 pipes for which the primary reason for rejection appears to have been circumferential cracks and which are indicated to have failed hydrostatic tests. Thirty of these 150 pipes are indicated to have more than one defect. We think there is sufficient doubt as to whether pipes with more than one defect were repairable as to justify their rejection. Of the remaining 120 pipes, nine are 54 inches, sixteen are 60 inches, fourteen are 66-inch x 16-foot, 52 are 66-inch x 20-foot and 29 are 72-inch pipes. One 72-inch pipe was rejected for a longitudinal crack notwithstanding it passed the hydrostatic test. In addition, one 66-inch by 16-foot pipe and one 72-inch pipe were rejected for circumferentially cracked spigots notwithstanding the pipes passed hydrostatic tests.

There is, of course, no way of determining how many of the above pipes would have passed the hydrostatic test if repairs had been permitted prior to testing. However, the Government is not in a position to complain since its refusal to permit repairs allowed by the contract

has made the evidence unavailable. In the nature of a jury verdict we conclude that Cen-Vi-Ro should have been permitted to repair ten of the 54-inch pipes, five of the 60-inch pipes, 24 of the 66-inch pipes, five of which are 66-inch x 16-foot, and ten of the 72-inch pipes and that these pipes would have passed the hydrostatic test and then been acceptable pipes. These figures include the identified pipes (seven 54-inch, six 66-inch x 20-foot and one 72-inch) considered acceptable by Dr. Davis which are not shown to have multiple defects or extensive cracks. It follows that Cen-Vi-Ro is entitled to an equitable adjustment measured by the cost of producing these pipes less the cost of repairs. We also conclude that Cen-Vi-Ro should have been permitted to repair the three pipes referred to above (two 72-inch and one 66-inch x 16-foot) which passed the hydrostatic test and that they would then have been acceptable pipes. Cen-Vi-Ro is also entitled to an equitable adjustment for the cost of producing these pipes less the cost of their repair.

During the May 15 inventory, 55 pipes, 42 of which had been repaired and previously accepted, were rejected for circumferential cracks and 53 pipes, forty of which had been repaired and previously accepted, were rejected for longitudinal cracks. The prior acceptance establishes prima facie that the 82 previously accepted pipes complied with contract requirements. During the reclaim program twenty pipes previously rejected for circumferen-

tial cracks and 28 pipes previously rejected for longitudinal cracks were accepted. The Bureau regarded as reclaims of prior rejects certain pipes marked for special hydro during the May 15 inventory, even though these pipes were not listed as rejects during the May 15 inventory. We have found that the twenty reclaims of prior rejects for circumferential cracks were other than any of the 42 repaired and previously accepted pipes. We conclude that Cen-Vi-Ro has met its burden of proving that these 42 pipes complied with contract requirements and were improperly rejected. Two of these pipes were 72 inches in diameter, two were 66-inch by 20-foot, twenty were 60 inches and eighteen were 54 inches in diameter.

Pipes with repairs to short longitudinal cracks which were accomplished prior to May 13, 1965, were subjected to hydrostatic tests in accordance with the May 24 memorandum. The record does not show the length of the cracks on any of the forty repaired and previously accepted pipes rejected for longitudinal cracks in the May 15 inventory. However, accepting the 28 reclaims for longitudinal cracks as pipes rejected in the May 15 inventory, it is obvious that a minimum of fifteen of the repaired and previously accepted pipes were reaccepted. We find that these fifteen pipes passed the hydrostatic test and that their rejection was improper. It follows that Cen-Vi-Ro is entitled to an equitable adjustment for the

interim wrongful rejection of these fifteen pipes.

The appeal as to longitudinal and circumferential cracks is sustained as to 94 pipes (28 54-inch, 25 60-inch, 21 66-inch x 20-foot, six 66-inch x 16-foot, and 14 72-inch) which were improperly rejected, as to the interim wrongful rejection of 15 pipes and is otherwise denied. Cen-Vi-Ro is entitled to an equitable adjustment measured by the cost of producing 42 of these pipes. For the remaining 52, Cen-Vi-Ro is entitled to an equitable adjustment measured by the cost of production less the cost of necessary repairs. The amount of the equitable adjustment will be determined infra.

*Defects in Bell and Spigot Areas
and Unconsolidated Concrete in
Spigots and Barrels*

Included under this heading are 146 pipes rejected for rocky or unconsolidated, sometimes referred to as underfilled, bells, 170 pipes rejected for impact damage to bells and spigots and 67 pipes rejected for unconsolidated areas in barrels or spigots for a total of 383 pipes (Exh. 5Q). As we have seen (note 124, *supra*), the contracting officer considered circumferentially cracked spigots under this heading. The specification, Subparagraph 67.e.(3), provides in part: "The duration and speed of spinning shall be sufficient to completely distribute and thoroughly consolidate the concrete and produce an even interior surface." Subparagraph 67.h.(4)(g), provides:

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(g) The surfaces of the bell and spigot in contact with the gasket, and adjacent surfaces that may come in contact with the gasket within a joint movement range of three-fourths inch, shall be free from airholes, chipped or spalled concrete, laitance, or other defects, except that individual airholes may be repaired as provided in Subparagraph j.(2).

Cen-Vi-Ro relies on provisions of the Concrete Manual providing that imperfections or damage which can normally be repaired include the following:

- (1) Rock pockets.
- (4) Broken bells containing circumferential reinforcement.
- (5) Impact damage over less than 45° of circumference except for spigots.
- (7) Out-of-round bells, if not so far out of round that reinforcement steel will be exposed after the repair.
- (8) Air holes and roughness in gasket bearing surfaces of bell and spigots (Exh. 5N, p. 7).

The Bureau's letter of May 13, 1965, provided in part:

3. Experience has been that extensive repairs to bells and spigots has impaired the function of the joints. Pipe having imperfections or damaged areas that extend over six inches of gasket area in the bell¹³³ or four inches in the spigot will be rejected. * * *

4. Extensive repairs to rock pockets in bells and lack of consolidation of the concrete that will result in poor bond between the concrete and the steel will not be permitted.

Although it appears that rocky bells result from a lack of complete

consolidation of concrete (Deposition, p. 75) and it is clear that the Bureau regarded rocky bells as repairable,¹³⁴ it is far from clear that rocky bells are normally repairable in accordance with the Concrete Manual. However, the Government's argument that rocky bells are not repairable appears to be based solely upon Cen-Vi-Ro's alleged failure to take known corrective action and we assume that rocky bells are normally repairable as rock pockets, exposed steel, or as roughness in gasket bearing surface of bells. Although the Manual does not provide any area or size limitations on the repair of the above defects, we hold that all of such defects are not repairable and that some discretion may be exercised as to the extent of the area that is properly repairable. Bureau instructions in effect as early as April 30, 1965 (note 133, *supra*), precluded the repair of rocky bells in excess of six inches. This restriction was continued in the May 13 letter which, as we have seen, provided that pipes having imperfections or damaged areas of bells in excess of six inches would be rejected. Since the Manual allows the repair of impact damage to bells extending over less than 45° of circumference (45° on the circumference of a 54-inch pipe is in excess of 21 inches), the May 13 letter clearly prohibited repairs to

¹³³ Instructions precluding repair of rocky bells in excess of six inches in gasket areas and fallouts in excess of one square foot were in effect as early as April 30, 1965 (note 26, *supra*). This restriction was reiterated in the Tentative Instructions to Concrete Inspectors dated May 7, 1965 (*Id.*).

¹³⁴ A Pipe Rejection Certification, dated April 2, 1965 (App's Exh. E), clearly indicates that the Bureau regarded rocky bells as repairable. An Inspectors Daily Report, dated July 29, 1964, reflects that only bells regarded as "too rocky" were not repairable.

impact-damaged bells which were permissible under the Manual.

While the Tentative Instructions to Concrete Pipe Inspectors of May 7, 1965, allowed the repair of damaged spigot gasket areas of six inches and below, the May 13 letter precluded repair of imperfections or damage to gasket areas of spigots in excess of four inches. Since breaks entirely through the shell in gasketed spigots which extend into or beyond the gasket bearing area and extend more than four inches around the circumference under the gasket are not normally repairable under the Manual, it is obvious that restrictions on repairs to spigots were much less extensive than the restrictions to repair of bells. However, read literally, the May 13 letter precluded the repair of defects in spigot gasket areas in excess of four inches irrespective of whether the break extended entirely through the shell and to that extent was contrary to the Concrete Manual.

We find that some unconsolidated areas in barrels and spigots were normally repairable as rock pockets in accordance with the Concrete Manual.

In its letter of June 10, 1965 (Exh. 5N, p. 15), Cen-Vi-Ro stated that its experience was that properly repaired bells and spigots have not impaired the function of the joints and that pipes so repaired were equal to pipes not requiring repairs. Cen-Vi-Ro also stated that a certain number of rocky bells was inherent in manufacturing pipe by the spinning process and that prop-

erly made repairs to rocky bells and damage to spigot ends should be allowed in accordance with the specifications without the restrictions in the May 13 letter. The contracting officer found that the Bureau, in the early stages of the work, permitted extensive repairs to bells and spigots but withdrew this concession when it was determined that such repairs impaired the function of the joints (par. 37, Findings of Fact). The only evidence supporting the contracting officer's finding that repairs to bells and spigots impaired the function of the joints is some rather vague testimony by Mr. Rippon to the effect that repairs to bells and spigots which were not accomplished within specification tolerances on other contracts resulted in leaking joints (Tr. 1752), and some testimony equally lacking in specificity by the resident engineer of reports to the effect that the laying contractor experienced difficulty in joining pipes with rough bells.¹³⁵ Hydrostatic tests on joints produced satisfactory results (Page 4 of Special Report, dated May 21, 1965, note 24, *supra*). This is some evidence that joints were not defective. Roughness in gasket bearing surfaces of bells and spigots, is, of

¹³⁵ Tr. 1888, 1889. A letter from R. H. Fulton to Cen-Vi-Ro, dated October 7, 1965 (Exh. 26) states that because of the marginal quality of the bells Cen-Vi-Ro had consigned repair crews to the field in order to avoid laying problems. However, a memorandum written by Mr. Herrera, dated October 11, 1965 (Cen-Vi-Ro Correspondence) states that he has made periodic checks in the field, that pipes were above average requirement and indicates laying difficulties were attributable to practices of R. H. Fulton's laying crews.

course, normally repairable under the Manual.

During the May 15 inventory 278 pipes were rejected for damaged bells or spigots which includes 233 rejected for rocky bells, and 31 pipes were rejected for rock pockets.¹³⁰ There is no evidence that any of these pipes had previously been accepted. It appears that prior to May 15 inventory 143 pipes had been rejected for bell and spigot defects and 12 pipes had been rejected for rock pockets (Exh. 59). In early August 1965, the Bureau relaxed the criteria for repair of rocky bells stated in the May 13 letter so that rocky bells which extended less than one-quarter of the circumference of the bell and which did not extend beyond the reinforcing steel when chipped out were repairable (Tr. 1289; memorandum of Bureau Meeting, dated July 9, 1965, Cen-Vi-Ro Correspondence; Inspectors Daily Report, dated August 4, 1965). The relaxation applied to pipes undergoing review in the reclaim program as well as to current production. Hydrostatic testing of these pipes does not appear to have been required (Inspectors Daily Report, dated August 4, 1965). The criteria in the May 13 letter for the repair of bells was not further relaxed and the Bureau continued to reject pipes with bell defects or damage other

than rocky bells in excess of six inches in bell area.¹³⁷ The Summary of Pipe Units Reclaimed (Exh. 146) indicates that only 34 pipes previously rejected for bell or spigot defects were accepted in the reclaim program during the seven-month period November 1965 through May of 1966. However, since there were 146 pipes finally rejected for rocky bells (Exh. 5Q), which includes at least 22 rejects manufactured subsequent to May 15, 1965, it is apparent that a minimum of 109 pipes previously rejected for rocky bells must have been accepted. The above figure does not include any pipes rejected for rocky bells prior to May 15, 1965, and we have no doubt that a majority of the 143 pipes rejected for bell and spigot defects prior to May 15 were for rocky bells. We have previously found that pipes marked for special hydro in the May 15 inventory were not listed as rejects in the summaries resulting from that inventory but that some of such pipes were, nevertheless, included in the tabulations purportedly representing the disposition of all rejects in the May 15 inventory (note 95, *supra*). We conclude that most, if not all, of the 233 pipes rejected for rocky

¹³⁰ Pipe Units Rejected on May 15, 1965 (Exh. 60), and tabulation attached to memorandum, dated May 27, 1965 (note 27, *supra*). The tabulation indicates that 233 pipes were rejected for rocky bells and 25 for rock pockets during the May 15 inventory.

¹³⁷ Mr. Herrera is reported to have inquired of Mr. Thomas why the Bureau was still rejecting pipes with rocky bells which could be repaired. The response was that the extent of defective concrete could not be determined until it was chipped out, the pipes were rejected until satisfactorily repaired, all such pipes were not repairable and in any event, Cen-Vi-Ro would never repair all of such pipes. (Inspectors Daily Report, dated August 19, 1965.)

bells in the May 15 inventory were subsequently accepted.

Our examination of the Final Inventory of Rejected Pipe (Exh. 152) indicates that it contains 88 final rejects for broken or impact damage to bells, of which five were charged to Fulton, and 72 pipes rejected for broken or impact damage to spigots, of which four were charged to Fulton. It is not clear how many pipes were rejected for these reasons prior to the May 15 inventory or how many, if any, of the 45 apparently rejected for this reason in the May 15 inventory were accepted during the reclaim program.

The Hydrostatic Test Study (Exh. 64) reflects that 25 percent of 16-foot pipes subjected to special hydrostatic tests for rock pockets or unconsolidated areas failed the tests and that approximately 16 percent of 16-foot pipes subject to special hydrostatic tests for miscellaneous reasons failed the tests. Only three 20-foot pipes appear to have been specially hydrostatically tested for rock pockets or unconsolidated areas other than gyro areas of which two passed and one failed. Approximately 32 percent of 20-foot pipes tested for miscellaneous reasons failed the tests. While it may well be as Cen-Vi-Ro asserts that some of the above pipes classified as failures would have healed within seven days, we find *infra* under the heading of "Testing Criteria" that the contract placed the burden of proof that dripping pipes would heal on Cen-Vi-Ro.

We turn to the question of Cen-Vi-Ro's alleged failure to take known corrective action. Dr. Davis attributed rocky bells to the failure to have sufficient concrete in the bell due to lack of vibration during the spinning process (Deposition, p. 75). The project engineer and the resident engineer considered that rocky bells were caused by difficulties in properly filling the bells due to the relatively dry Cen-Vi-Ro mix (Tr. 1889, 1890, 2043). This reason is supported by Mr. Murray's memorandum of July 8, 1965, (note 127, *supra*). Irrespective of whether one or the other or both of these reasons may account for rocky bells, we conclude that there was a corrective action for rocky bells which Cen-Vi-Ro either knew or as a reasonable skilled contractor is chargeable with knowing, namely, proper mix and proper filling of the bells. However, Dr. Davis testified that in spinning concrete pipe, segregation of aggregate tends to occur (Deposition, p. 75) and we accept as accurate Cen-Vi-Ro's assertion (letter of June 10, 1965, Exh. 5N, p. 15) that a certain number of rocky bells is inherent in manufacturing concrete pipe by spinning methods.

The record reflects that 124 of the 146 final rejects for rocky bells were manufactured prior to May 15, 1965 (Exh. 5Q). Ten of the final rejects for rocky bells were manufactured in September (approximately 1.4 percent of pipe production), 24 in November (approximately 2.4 percent of pipe

production), 37 in December 1964 (approximately 3.6 percent of pipe production), four in January (approximately 0.28 percent), three in February (approximately 0.27 percent), three in March (approximately 0.22 percent) and 13 in April 1965 (slightly over one percent). Final rejects for rocky bells, considered as evidence of defects, manufactured in November and December of 1964 were, of course, very substantial. However, the reject-defect rate for rocky bells declined significantly during the following three months, which is evidence that corrective action was being taken to reduce or eliminate rocky bells.

Although we have considered that each defect must be examined separately to determine if the record establishes a cause and a corrective action therefor, we have noted an inverse relationship between rocky bells and slump or fallouts (note 127, *supra*). This relationship is confirmed in part by the fact that final rejects for fallouts manufactured in January 1965 were 0.35 percent of pipe production, 0.92 percent in February, 1.5 percent in March and 0.54 percent in April 1965. We conclude that reject-defect rates for rocky bells and fallouts may be combined for the purpose of determining the question of "continuing failure to take known corrective action" and that these defects continued for a sufficient period of time that Cen-Vi-Ro may properly be charged with such a failure prior to May 15, 1965. There is no evidence that rocky bells were

a significant problem after May 15, 1965 (only 22 final rejects for such reason were manufactured after that date) and we find that repairs to rocky bells normally permissible under the Concrete Manual could not properly be refused after May 15, 1965.

We have identified 23 pipes in the Final Inventory of Rejected Pipe (Exh. 152) manufactured after May 15, 1965, for which the primary reason for rejection appears to have been rocky bells. Three of these pipes are indicated to have multiple defects. Defective areas on two of the pipes (66AB50X16, No. 8N and 19D, mfg. 11-16-65 and 12-31-65, respectively) extended more than one-quarter of the circumference of the pipe (pp. 30 & 74, Vol. II, Exh. 40). One other pipe (72AB50, No. 6D, mfg. 1-28-66) upon which the defective area appears to extend less than one-quarter of the circumference had exposed steel in the rocky area (p. 91, Vol. II, Exh. 40). We conclude that Cen-Vi-Ro should have been permitted to repair this pipe. The rocky area on about eight of a row of approximately seventeen 66-inch pipes which were rejected for rocky bells and fallouts appears to extend more than one-quarter of the circumference of the pipe (p. 42, Vol. III, Exh. 40). These pipes have not been identified and it is not possible to determine if they are included in the Final Inventory of Rejected Pipe. The extent of the rocky area on the remainder of the pipes rejected for rocky bells is not shown.

Impact damage to bells and spigots, as the name implies, occurred during handling of the pipes. It cannot, of course, be doubted that there is a known corrective action for impact damage, namely careful handling of the pipes. We note Mr. Herrera's testimony (Tr. 779) that he thought Cen-Vi-Ro experienced unnecessary impact damage because he didn't think they should have had any. We also note that if the delays in pipe manufacture which forced the suspension of laying operations by the subcontractor, R. H. Fulton, are Cen-Vi-Ro's responsibility, then the resulting inventory of pipes and increased handling which would normally result in more impact damage are also Cen-Vi-Ro's responsibility. Nevertheless, and in view of the provisions of the Concrete Manual, we conclude that it would be unrealistic to expect the total elimination of such damage on a project involving the manufacture, test and installation of thousands of pipes.

There is also the matter of increased handling due to hydrostatic tests in excess of contract requirements. In a letter to Raymond International, Inc., dated July 2, 1965 (Cen-Vi-Ro Correspondence), Mr. Hubbard expressed the opinion that rejects normally expected, due to accidental damage and other factors, should not exceed one-half of one percent. This letter was, of course, written over one year after production of pipes had commenced. Relating final rejects to the months in which the pipes were

manufactured indicates that only one month (October, 1964) appears to have been free of final rejects for impact damage, Exh. 5Q). However, comparing pipe production in particular months with the number of pipes manufactured in those months which were ultimately rejected for impact damage would serve no useful purpose, since rejection did not necessarily occur as the pipes were produced and the record does not support the view that the majority of impact damage occurred during or immediately after the pipes were produced. The 170 final rejects for impact damage constitute approximately 0.56 percent of the 30,133 pipes produced under DC-6000. The evidence does not establish any relationship between impact damage and other defects. We find that the record would not support a finding that Cen-Vi-Ro continually failed to take known corrective action to eliminate or reduce impact damage.

From our examination of the Final Inventory of Rejected Pipe (Exh. 152), we identify 88 pipes rejected for broken or impact damaged bells, of which 13 have multiple defects (seven of which failed hydrostatic tests), two additional pipes failed hydrostatic tests, one pipe (66A75X20, No. 14D, mfg. 4-18-66) passed the test and five were charged to Fulton. The pipe which passed the test is on the list of identified pipes considered acceptable to Dr. Davis. Photos indicate that the damaged areas on two pipes (66AB50X16, No. 8D, mfg. 3-7-66;

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and 72AB50X20, No. 7D, mfg. 2-22-66) extend less than 45° of the circumference of the pipe and thus were normally repairable in accordance with the Concrete Manual (pp. 96, 109, Vol. II, Exh. 40). As noted below, the former pipe is on the list of identified pipes considered acceptable by Dr. Davis. A Reject Certification (Exh. 121) contains a statement by the Cen-Vi-Ro representative that the seepage from impact cracks on the second pipe could be solved by minor repair. We accept this statement as accurate.

We also identify 72 pipes for which the primary reason for rejection was broken or impact damaged spigots of which ten have multiple defects (two of these failed hydrostatic tests), one additional pipe failed the test, two pipes (66AB50X20, No. 6N and 4D, mfg. 12-7-64 and 12-3-65, respectively) passed the hydrostatic test and four pipes were charged to Fulton. A Reject Certification (Exh. 121) states that the gasket groove on the former pipe which passed the test was broken "completely off" for a distance of about ten inches. Photos of seven of the rejected pipes are in the record. With two exceptions, the photos establish that the rejections were proper. While it appears that the damaged area on one of the pipes (72AB50, No. 9N, mfg. 7-13-65) extended for more than four inches along the spigot gasket groove, it is not clear that the break was entirely through the shell (p. 70, Vol. I, Exh. 40). The other pipe (66A25X20, No. 3D, mfg. 3-2-66)

is indicated to have leaked on hydrostatic test at a slump area in the spigot (p. 106, Vol. II, Exh. 40). We conclude that Cen-Vi-Ro has not shown that these pipes were properly repairable.

During his March 1967 inspection Dr. Davis examined 16 pipes which were rejected for impact damage of which he considered that eight should have been accepted.¹³⁸ Five pipes (one 54-inch and four 66-inch of which one is 66-inch x 16-foot) with broken or impact damage to bells are on the list of identified pipes considered acceptable by Dr. Davis (Exh. 124 and 154). One of the 66-inch pipes with a broken bell failed two hydrostatic tests and one 66-inch pipe (66A75X20, No. 14D, mfg. 4-18-66) with a broken bell passed the test. One of the pipes considered acceptable by Dr. Davis (66AB50X16, No. 8D, mfg. 3-7-66) has been identified previously as included in the photographs (p. 96, Vol. II, Exh. 40). The photo con-

¹³⁸ Summary of Professor Davis' Comments on Pipe (note 91, *supra*). The Final Inventory of Rejected Pipe (Exh. 152) lists broken bells and spigots and impact damage to bells and spigots as separate reasons for rejection. The Concrete Manual also treats broken bells and impact damage separately. Dr. Davis apparently did not distinguish between broken bells and impact damage since his summary does not indicate that he inspected any pipes for broken bells. Yet the list of identified pipes which he considered acceptable (Exh. 154) contains two pipes rejected for broken bells. Mr. Peckworth attributed broken bells primarily to impact damage (Tr. 106). Summaries of rejected pipes prepared by the Government do not distinguish between broken bells and spigots and impact damage to bells and spigots (Exhs. 5Q and 5R). In view of the above and since we regard permissible repairs to broken bells and impact damage to bells as comparable under the Manual, we are justified in treating the two defects similarly.

firms that the damaged area of the bell on this pipe extended less than 45° of the circumference. Since the Government refused to permit repairs to impact damaged bells in accordance with the Concrete Manual we attach little or no significance to the fact that one of the identified pipes failed two hydrostatic tests. We conclude that Cen-Vi-Ro has established prima facie that these five pipes were properly repairable under the Concrete Manual.

Dr. Davis examined 26 pipes rejected for rocky bells. He considered that four out of 26 or approximately 15 percent should have been accepted with repair. However, none of the pipes rejected for rocky bells which he examined has been identified.

The record does not reveal any reason for unconsolidation of concrete in barrels and spigots. Since we have found that unconsolidated gyro area concrete was attributable to a dampening of vibration at the points where the gyro rings encircled the forms on the 20-foot spinner, it would seem logical to attribute unconsolidation in barrels and spigots to similar causes. However, there does not appear to be any correlation between the number of final rejects for unconsolidated concrete in barrels and spigots and final rejects for gyro areas. The Government attributes 64 of the 67 final rejects for unconsolidated concrete in barrels and spigots to the period prior to May 15, 1965 (Exh. 5Q).

Thirty of these are indicated to have been manufactured during the shakedown period. Thereafter, unconsolidated concrete other than in gyro areas does not appear to have been a significant problem. Final rejects for this reason taken as evidence of defects, averaged approximately 0.22 percent of production during the so-called crisis period of January through April 1965. The record rather than supporting a finding of a continuing failure to take known corrective action to reduce or eliminate unconsolidated concrete other than in gyro areas, in our opinion supports the contrary conclusion. We so find.

We have identified 32 of the 67 final rejects for unconsolidated areas in barrels or spigots as distinguished from gyro areas. Fifteen of these pipes have multiple defects, or are indicated to have been rejected by Cen-Vi-Ro (two of these failed hydrostatic tests). One other pipe (72AB50, No. 15N, mfg. 3-9-65) passed the hydrostatic test. We conclude that Cen-Vi-Ro should have been permitted to repair this pipe. Dr. Davis does not appear to have examined any pipes which were rejected for this reason. None of these pipes are included in the photographs of defective pipes.

Although the contracting officer does not appear to have specifically considered unconsolidated concrete other than gyro areas as a reason for rejection, it is clear that his intention was to deny Cen-Vi-Ro's claims in their entirety. We con-

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clude that remand to the contracting officer would serve no useful purpose.

Decision

Directives and instructions in effect as of April 30, 1965, provided that pipes with imperfections or damaged areas extending over six inches in gasket area of bell would be rejected. These instructions were affirmed in the May 13 letter which also provided that pipes with imperfections or damaged areas exceeding four inches in gasket areas of the spigot would be rejected.

Rocky bells result from insufficient concrete in the bell and are otherwise referred to as unconsolidated or underfilled bells. Difficulty in properly filling the bells appears to be due primarily to the mix used in the Cen-Vi-Ro process. Although it is not altogether clear, we assume that rocky bells are normally repairable as rock pockets, exposed steel or as roughness in the gasket bearing areas of the bell in accordance with the Concrete Manual. In any event, the Bureau permitted substantial repairs to rocky bells prior to April 30, 1965, and the Government's only argument that rocky bells are not repairable appears to be based on Cen-Vi-Ro's alleged failure to take "known corrective action." During the May 15 inventory which was conducted in accordance with the May 13 letter, the Bureau rejected 233 pipes for rocky bells. Although a limited number of rocky bells is inherent in the manufacture of concrete pipe by spin-

ning methods, we have concluded that there is a known corrective action for rocky bells which Cen-Vi-Ro either knew or is chargeable with knowing, namely a proper mix and proper filling of the bell. We have also found that rocky bells considered as defects were manufactured for a sufficient period of time and in sufficient quantities that Cen-Vi-Ro may be found to have continually failed to take that corrective action prior to May 15, 1965. After May 15, 1965, rocky bells were not a significant problem and the record supports the conclusion that corrective action was taken to reduce rocky bells after that date.

In early August 1965 the Bureau relaxed the restriction in the May 13 letter and permitted the repair of rocky bells which extended less than one-quarter of the circumference of the pipe and did not extend beyond reinforcing steel when chipped out for repair. This relaxed criteria was applied to previously rejected pipes as well as current production and resulted in the acceptance of most, if not all, of the 233 pipes which were rejected for rocky bells in the May 15 inventory. While it is clear that not all rocky bells are repairable and that the magnitude and extent of the defect must be considered, the Manual permits the repair of exposed steel on the inside of pipes 36 inches or larger in diameter. It also contemplates the repair of areas extending beyond reinforcing steel. We cannot say that limiting restrictions on repair of rocky bells to an area less than one-

quarter of the circumference of the bell was unreasonable; however, we conclude that limiting repair of rocky bells to areas which did not extend beyond reinforcing steel was not in accordance with the Manual. As pointed out *ante* (note 88, *supra*), Cen-Vi-Ro has largely eschewed identification of particular pipes it considers were improperly rejected. A photo of one 72-inch pipe having exposed steel in the rocky area reflects that the defective area on this pipe extended less than one-quarter of the circumference. We find that this pipe was improperly rejected.

The Bureau's instructions precluding repairs to damaged bells that extend over six inches in gasket areas clearly constituted a restriction on repairs to impact damaged or broken bells which are normally repairable in accordance with the Concrete Manual. There is no evidence that these restrictions were ever relaxed or changed in any way. The evidence would not support a finding that Cen-Vi-Ro continually failed to take known corrective action to reduce or eliminate impact damage. We have identified 88 final rejects for broken or impact damage to bells of which 13 have multiple defects and five were charged to R. H. Fulton, the pipe laying subcontractor. While a photo indicates that a 72-inch pipe which was rejected for impact damage to the bell leaked when hydrostatically tested, we have accepted as accurate a statement by a Cen-Vi-Ro representative that the leakage could be cured

by minor repair. In addition, Cen-Vi-Ro has identified and established *prima facie* that five pipes (one 54-inch and four 66-inch of which one is 66-inch x 16-foot) examined by Dr. Davis which were rejected for broken or impact damage to bells were properly repairable in accordance with the Concrete Manual. We find that the rejection of these six pipes was improper.

Since breaks on gasketed spigots which are entirely through the shell and into or beyond the gasket bearing area and which extend for more than four inches around the circumference under the gasket are not normally repairable under the Concrete Manual, it is not clear that Bureau instructions precluding repair of imperfections or damage which extend more than four inches in the spigot gasket area restricted repairs allowable by the Manual. However, read literally, the May 13 letter precluded repairs to damaged or defective spigot gasket areas in excess of four inches irrespective of whether the break was through the shell. We have identified 72 pipes rejected for broken or impact damage to spigots. The extent of the damaged areas on the great majority of these pipes is not shown. Photos of seven of the rejected pipes are in the record. The photos support the conclusion that the rejection of five of the pipes was proper. Although two 66-inch x 20-foot pipes rejected for broken spigots passed the hydrostatic test, other evidence establishes that the rejection of one of these pipes was proper. We con-

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clude that Cen-Vi-Ro has not carried its burden of proving that any of these 72 pipes were improperly rejected.

We have found that some unconsolidated concrete in barrel and spigot areas of the pipe was normally repairable as rock pockets in accordance with the Concrete Manual. The record would not support a finding that Cen-Vi-Ro continually failed to take known corrective action to reduce or eliminate this type of defect. We have identified 32 of 67 final rejects for this reason of which 15 have multiple defects or were Cen-Vi-Ro rejects. There is no evidence of the extent of unconsolidation on these pipes. One 72-inch pipe is indicated to have passed the hydrostatic test. We conclude that Cen-Vi-Ro should have been permitted to repair this pipe.

It is clear that the Bureau's restrictions on the repair of impact damage to bells and rock pockets were not in accordance with the Concrete Manual and thus constituted changes within the meaning of the "Changes" clause. While not so clear, the Bureau's restrictions on repair of damaged or defective spigot gasket areas and its relaxed criteria for the repair of rocky bells were also contrary to the Concrete Manual. However, it is well settled that the mere fact a change has been effected does not, without more, establish entitlement to additional compensation. *Joseph Sternberger v. United States* (note 116, *supra*).

The appeal as to bell and spigot defects and unconsolidated concrete

in pipe barrels is sustained as to eight pipes (one 54-inch, one 66-inch x 16-foot, three 66-inch x 20-foot and three 72-inch) which were improperly rejected for unconsolidation, rocky and broken or impact damage to bells and is otherwise denied. Cen-Vi-Ro is entitled to an equitable adjustment measured by the cost of producing these pipes less the cost of repair. The amount of the equitable adjustment will be determined *infra*.

Fallouts

In addition to sections of the specifications previously cited, requiring that pipes have an even interior surface, the specifications required that placing of concrete be such as to assure satisfactory bond between the concrete and the steel (Subparagraph 67.e.(3), Specifications DC-6000), and that pipes have circular and cylindrical inner surfaces and be free from excessive interior surface crazing and roughness (Subparagraphs 67.e.(2) and j.(2)).

Cen-Vi-Ro contends that the provisions of the Concrete Manual providing for the repair of rock pockets and exposed steel on the outside of any size pipe and on the inside of pipe 36 inches or larger in diameter without any repaired area limitation being specified means that most fallouts are repairable. There is no evidence of the area of fallout the Bureau considered repairable prior to April 30, 1965. Bureau instructions in effect as of April 30, 1965

(note 26, *supra*), which were reaffirmed in the May 13 letter, restricted repairs of fallouts to those of one square foot or less.

It appears that prior to May 15, 1965, a total of 116 pipes had been rejected for fallouts of which 42 had been rejected by Cen-Vi-Ro (Exh. 59). The record does not indicate the area of the fallouts on these pipes. During the May 15 inventory which was conducted in accordance with the criteria in the May 13 letter, 214 pipes were rejected for fallouts in excess of one square foot of which approximately 25 percent had been repaired.¹³⁹ In July 1965 the Bureau relaxed the criteria for the repair of fallouts so that the matter of the permissible repairable area was left more to the judgment of the inspectors.¹⁴⁰ Although Mr. Lincoln testified that the relaxation was because fewer pipes with fallouts were being encountered (Tr. 1895), the relaxation apparently applied to previously rejected pipe as well as current production (Inspectors Daily Report, dated July 22, 1965). There-

after fallouts of approximately two square feet were considered repairable.¹⁴¹ It does not appear that this limitation was based on any evidence of what Cen-Vi-Ro was capable of repairing. Despite the relaxation, the Summary of Pipe Units Reclaimed (Exh. 146) indicates that only 16 pipes previously rejected for fallouts were accepted during the reclaim program. However, since there were 205 final rejects for fallouts of which 26 are indicated to have been manufactured after May 15, 1965, and the record indicates there were 330 pipes rejected for fallouts as of May 15, 1965, we find that a minimum of 150 pipes previously rejected for fallouts were ultimately accepted. This is in accord with the contracting officer's finding (pars. 42 and 43, Findings of Fact). Although Mr. Thomas testified that pipes with repairs to fallouts were hydrostatically tested in order to test the repaired areas (Tr. 1399, 1400), the Hydrostatic Test Study (Exh. 64) does not indicate the number of tests for such purpose.

¹³⁹ Tabulation, dated April 18, 1967 (Exh. 60). The tabulation attached to memorandum, dated May 27, 1965 (note 27, *supra*), indicates that 210 pipes were rejected for fallouts in excess of one square foot during the May 15 inventory of which approximately 25 percent had been repaired.

¹⁴⁰ Tr. 1288, 1289, 1894, 1895; Inspectors Daily Report, dated July 22, 1965; memorandum of Bureau Meeting, dated July 9, 1965, and Hubbard letter of August 9, 1965, Cen-Vi-Ro Correspondence. An Inspectors Daily Report, dated July 16, 1965 (Exh. 100), indicates that the project engineer expressed concern because the inspectors accepted a 54-inch pipe with a repaired fallout three feet by 1½ feet in area. Such actions would have a natural tendency to make the inspectors conservative in deciding what was repairable.

¹⁴¹ We note, however, that photos of rejected pipes manufactured after July of 1965 continue to reflect 54-inch and larger diameter pipes as being "rejected for fallout in excess of one square foot." See, e.g., p. 141, Vol. I; pp. 21, 28, 38, 43, 57, 61, 72, 75 and 120, Vol. II (Exh. 40). However, we find that all of the pipes shown in these photographs are not included in the Final Inventory of Rejected Pipe (Exh. 152). In addition, a note appended to an Inspectors Daily Report, dated January 10, 1966, by Mr. Lincoln states that repair of an eight-inch square area of a pipe upon which concrete had been removed to the steel for the purpose of determining the water/cement ratio was outside the limits of acceptable repairs in the specifications and the May 13 letter.

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Dr. Davis testified that the one square foot limitation was appropriate for pipes of only 36 inches in diameter, but that for a pipe 72 inches in diameter he would probably allow an area of up to four square feet to be repaired (Deposition, p. 74). He stated that fallouts usually occur immediately after the pipes were manufactured and that the reinforcing steel would usually be exposed. This testimony has not been rebutted. The Board finds that fallouts are normally repairable in accordance with the Concrete Manual. We, therefore, reject the contracting officer's finding, which was based primarily on the conclusion the Concrete Manual was not applicable, that the Bureau's action in allowing repair of any fallouts was a matter of grace. However, it is clear that the permissible area for the repair of fallouts varies depending upon the size of the pipe and that all fallouts are not repairable notwithstanding the lack of a repaired area limitation in the Concrete Manual. The Bureau's action in relaxing the repairable area of fallouts to approximately two square feet constitutes a recognition that the one square foot limitation was too restrictive.

Since limiting the repairable area of fallouts to one square foot is appropriate for pipes 36 inches in diameter, we cannot say that the Bureau's action in limiting repairs of fallouts to two square feet on pipes of 54 inches in diameter was unreasonable. However, as to pipes larger than 54 inches in diameter, we con-

clude that the 2-square-foot limitation was unduly restrictive and that an area up to a maximum of four square feet for a pipe 72 inches in diameter was reasonably repairable. Twenty-one of the final rejects for fallouts were 72 inches in diameter of which three were manufactured after May 15, 1965, 122 were 66 inches in diameter of which 21 were manufactured after May 15, 16 were 60 inches in diameter of which only one was manufactured after May 15, 1965, and 46 were 54 inches in diameter all of which were manufactured prior to May 15 (Exhs. 5R & 152).

Dr. Davis examined 21 pipes rejected for fallouts of which he considered that 15 were acceptable with repairs (Exh. 2 of Deposition). Only one of these pipes (54AB50, No. 6D, mfg. 9-18-64) has been identified (Exh. 154). Although the record does not establish the area of the fallout on this pipe, we conclude that Cen-Vi-Ro has established prima facie that it was repairable in accordance with the Concrete Manual. However, we find *infra* that Cen-Vi-Ro is chargeable with a continuing failure to take known corrective action to reduce or eliminate fallouts prior to May 15, 1965, and Cen-Vi-Ro has not established that rejection of this pipe was improper.

As we have seen, there were 116 rejects for fallouts prior to May 15, 1965. The Government attributes manufacture of 180 of the final rejects for fallouts to the period prior to May 15, 1965 (Exh. 5Q). However, 40 of the 180 are listed as hav-

ing dates of manufacture illegible. Sixty-seven of the final rejects for fallouts were manufactured during the shakedown period. Of the remaining 73, definitely manufactured prior to May 15, 1965, 18 were manufactured in September (approximately 2.5 percent of pipe production), ten in October 1964 (approximately 1.1 percent of pipe production), five in January 1965 (approximately 0.35 percent of pipe production), ten in February (approximately 0.9 percent of pipe production), 21 in March (approximately 1.6 percent of pipe production) and seven in April 1965 (approximately 0.54 percent of pipe production). Final rejects for fallouts manufactured in other months do not appear to have constituted a significant problem.

In its letter of June 10, 1965 (Exh. 5 G), Cen-Vi-Ro stated "We seldom have fallouts with our present mix," thereby conceding fallouts were attributable primarily to mix design. Mr. Lincoln testified that fallouts were correctable by machine operators and design of the mix (Tr. 1892). Cen-Vi-Ro has made no attempt to rebut this testimony. We have previously referred to the inverse relationship between fallouts and rocky bells.

On the above evidence, we find that there is a corrective action that Cen-Vi-Ro, as a reasonably skilled contractor, either knew or is chargeable with knowing, namely, the proper mix and skilled operators, and that this defect was sufficiently serious that Cen-Vi-Ro cannot deny that it had a problem requiring cor-

rective action. We further find that this defect was sufficiently numerous and continued for a sufficient length of time that Cen-Vi-Ro may be charged with a continuing failure to take that corrective action as to pipes manufactured prior to May 15, 1965. However, fallouts were not a significant problem after May 15, 1965, and Cen-Vi-Ro may not be charged with a failure to take known corrective action after that date.

Our finding that Cen-Vi-Ro is chargeable with a continuing failure to take known corrective action to reduce or eliminate fallouts prior to May 15, 1965, makes it necessary that we consider the propriety of the rejection of only those pipes which were manufactured after that date. We have identified 26 pipes manufactured after May 15 in the Final Inventory of Rejected Pipe (Exh. 152) which appear to have been rejected for fallouts. Photos of eight of these pipes are in the record (p. 141, Vol. I; pp. 4, 5, 38, 61, and 75, Vol. II, Exh. 40). Information written in five of the pipes states that the fallouts on these pipes exceeded four square feet. The area of the fallout on one pipe (66B25 x 16, No. 2D, mfg. 9-21-65), which the caption indicates was rejected simply for a fallout in excess of one square foot, is not shown (p. 4, Vol. II, Exh. 40). Another pipe 66AB50 x 16, No. 2D, mfg. 8-20-65), which the photo indicates had a fallout one-half foot by 2½ feet in area (p. 141, Vol. I, Exh. 40) is stated to have three

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fallouts including one in the spigot (p. 14, Exh. 152). The third pipe (66B 25 x 20, No. 1D, mfg. 9-22-65) upon which the area of fallout does not appear (p. 5, Vol. II) is indicated to also have a broken spigot (p. 19, Exh. 152). We conclude that the evidence establishes that one of these pipes (66B25 x 16, No. 2D, mfg. 9-21-65) which was stated to be rejected for a fallout in excess of one square foot was repairable in accordance with the Concrete Manual.

Of the remaining 18 rejected pipes which were manufactured after May 15, 1965, one pipe (66AB-50 x 16 No. 11N, mfg. 12-14-65) is indicated to have a fallout 12 inches by 46 inches in area (p. 16, Exh. 152). Since the fallout area on this pipe approaches the maximum area considered repairable by Dr. Davis for a 72-inch pipe, we conclude that this pipe has not been shown to be repairable. Another pipe (66AB50 x 20, No. 12D, mfg. 11-4-65) is indicated to have a broken spigot in addition to a fallout (p. 34, Exh. 152). One pipe (66AB50 x 20, No. 2D, mfg. 10-19-65) passed the hydrostatic test (p. 33, Exh. 152). A Reject Certification (Exh. 121) states that the area of the fallout on this pipe was $3\frac{1}{2}$ feet by 14 inches or in excess of four square feet. Cen-Vi-Ro has not shown that any of these pipes were repairable.

Decision

We have found that fallouts are normally repairable as "rock pock-

ets or exposed steel on the outside of any size pipe and on the inside of pipes 36 inches or larger in diameter" in accordance with the Concrete Manual. However, not all fallouts are repairable and some limitation on the repairable area of fallouts is justified. The record indicates that 116 pipes, including 42 rejected by Cen-Vi-Ro, had been rejected for fallouts prior to the May 15 inventory. The evidence does not indicate the area of fallout the Bureau permitted to be repaired prior to April 30, 1965.

Beginning on April 30, 1965, the Bureau restricted the repairable area of fallouts to one square foot or less regardless of the size of the pipe. During the May 15 inventory 214 pipes were rejected for fallouts in excess of one square foot of which approximately 25 percent had been repaired. After mid-July 1965, the Bureau permitted the repair of fallouts up to an area of approximately two square feet. This revised criteria was applied to pipes previously rejected as well as to current production and resulted in the acceptance of 150 of the pipes previously rejected for fallouts.

The appropriate repairable area of fallouts depends on the size of the pipe. A limitation on the repairable area to one square foot or less is proper for pipes of 36 inches in diameter, but for pipes of 72 inches in diameter an area of up to a maximum of four square feet may reasonably be regarded as repairable. It follows that the limitation of repairable fallouts to one square foot

or less in area irrespective of the size of the pipe was a restriction on repairs normally permissible under the Manual. The Bureau by its action in increasing the permissible repairable area of fallouts to approximately two square feet has recognized that the one square foot limitation was too restrictive. We cannot say, however, that limiting the repairable area of fallouts on 54-inch diameter pipes to an area of approximately two square feet was unreasonable.

Fallouts are attributable to mix design and machine operators and Cen-Vi-Ro, as a reasonably skilled contractor, is chargeable with knowledge of the appropriate corrective action, namely having proper mix and skilled machine operators. There is an inverse relationship between fallouts and rocky bells and we hold that these defects were sufficiently numerous and continued for a sufficient period of time that Cen-Vi-Ro may properly be held to have continually failed to take known corrective action prior to May 15, 1965. It follows that restrictions on the repairable area of fallouts on pipes manufactured prior to May 15 was not improper. The record establishes that corrective action to reduce or eliminate fallouts was taken after May 15, 1965.

Dr. Davis considered that 15 of 21 pipes examined by him which were rejected for fallouts were acceptable with repairs. Only one of these pipes has been identified. Al-

though we have found that Cen-Vi-Ro has established that the identified pipe was repairable in accordance with the Concrete Manual, this pipe was manufactured during a period in which Cen-Vi-Ro is chargeable with failure to take known corrective action.

The 26 pipes rejected for fallouts after May 15, 1965, were all larger than 54 inches in diameter. We have found that the repairable area limitation of approximately two square feet for fallouts was improper as to pipes larger than 54 inches in diameter. The evidence indicates the area of the fallout on one 66-inch x 20-foot pipe manufactured after May 15, 1965, was 1.25 square feet. However, this pipe had two other fallouts including one in the spigot. The area of fallout on one 66-inch x 16-foot pipe manufactured after May 15 approached four square feet. A second 66-inch x 20-foot pipe manufactured after May 15, 1965, passed the hydrostatic test. The fallout on this pipe exceeded four square feet. We conclude these pipes were properly rejected.

A 66-inch x 16-foot pipe manufactured after May 15, 1965, was simply rejected for a fallout in excess of one square foot. We conclude that this pipe was repairable.

The appeal as to fallouts is sustained as to the one 66-inch x 16-foot pipe, which was improperly rejected and is otherwise denied. Cen-Vi-Ro is entitled to an equitable adjustment for the cost of this pipe less the cost of repair. The equitable adjustment is determined *infra*.

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Interior Scaling or Flaking of Pipe

As we have seen, the specifications (Subparagraph 67.j.(2)) provided in part: "Pipe shall have cylindrical interior surfaces and shall be free from fractures, *excessive interior surface crazing*, and roughness." (Italics supplied.)

The cited subparagraph also provided in pertinent part:

Pipe manufactured by a centrifugal spinning method shall be free from excessive brush marks, that indicate hard brushing of the interior surface for the removal of water and laitance, and which will markedly affect the water-carrying capacity of the finished pipeline.

The terms "scaling and flaking" were used to describe two distinct types of conditions on the interior surfaces of the pipes: cracking and actual flaking. The resident engineer described scaling or flaking interiors as ranging from surface cracking on the inside of the pipes to pipes in the storage yard in which a depth of up to $\frac{3}{4}$ of an inch, would crack, curl and flake out of the pipes (Tr. 1909). Mr. Murray testified that pipes which the Bureau regarded as having unacceptable interiors fell into two categories: half-moon shrinkage cracks and actual flaking.¹⁴² As will appear hereinafter,

the Bureau in inspecting pipes did not always distinguish between the two conditions.

While it appears that one or two pipes which had or developed scaling or flaking interiors as distinguished from bad interiors may have been manufactured as early as September of 1964 (Exh. 5Q; Exh. 152; Exh. 2 of Notice of Appeal, Exh. 6), we find that the great majority of pipes which had or developed these conditions were manufactured during the period late February through March of 1965 (Tr. 851, 1099, 1911, 1912, 1994, 2010; Exh. 5Q). Cracking, frequently, if not always, preceded flaking and there is no doubt that the condition on some of the pipes was progressive (Tr. 731, 732, 769, 903, 1910, 1911; Inspectors Daily Report, dated May 26, 1965). Although scaling or flaking sometimes appeared in pipes on the rollaway, that is, immediately after removal from the steam curing tunnel (Tr. 1910; Inspectors Daily Reports, dated March 22 and 23, 1965), cracking most often developed into flaking on pipes in the storage yard.¹⁴³ The record reflects and we

¹⁴² Tr. 851. An informative discussion of the two conditions of pipe interiors appears on page two of Mr. Hubbard's letter, dated August 9, 1965 (Cen-Vi-Ro Correspondence) wherein the interiors on a majority of the pipes rejected for scaling or flaking are described as "more like a shrinkage crazing." Mr. Franklin described bad interiors made on the 16-foot spinner as "crescent cracks" (Tr. 635). See also Kiesel letter of July 26, 1965 (Cen-Vi-Ro Correspondence).

¹⁴³ Tr. 731, 732, 769, 903, 1910 and 1911. Cen-Vi-Ro asserts that a certain amount of surface crazing is normal in all concrete pipes left exposed to the weather (letter of June 10, 1965, Exh. 5N, p. 15). However, we note the provisions of Subparagraph 67.o. of the specifications which provides in part:

"Hauling and handling—Pipe shall not be stored in the manufacturer's yard or at the jobsite for an extended period of time under conditions which would cause injurious drying out of the concrete. Whenever necessary, in order to prevent cracking of the concrete or other objectionable effect of drying, stored pipe shall be adequately protected by means of shelter and application of water. * * *

find that flaking or scaling interiors were the Bureau's principal cause for concern over the quality of the pipe beginning in early March of 1965 (Tr. 1747, 1994, 1995), and was the defect which led ultimately to the issuance of the May 13 letter. However, there is evidence, which we accept as correct, that prior to March of 1965 the Bureau did not regard minor interior surface cracking, and even some flaking as a cause for rejection.¹⁴⁴

Cen-Vi-Ro asserts that the flaking interiors were caused by changes in manufacturing methods made necessary by the Bureau's enforcement of an erroneous interpretation of the contract with respect to internal pipe diameters (Claim of October 13, 1966, Exh. 5M, p. A3; Notice of Appeal, p. 23). While we have ruled that the Bureau did not misinterpret the contract as alleged by Cen-Vi-Ro, we find that efforts to reduce or eliminate production of small diameter pipes as interpreted

¹⁴⁴ The resident engineer testified that cracks first observed were not considered serious and that pipes with minor surface cracking would not be a cause for concern (Tr. 1910, 1911). Mr. Herrera asserted that pipes with minor flaking or scaling were acceptable at one time (Tr. 732). An Inspectors Daily Report, dated January 12, 1965, signed by the chief plant inspector, questions whether he should "AOK" pipes with several shrinkage cracks, but expresses doubt that he could make a rejection stand. An Inspectors Daily Report, dated March 23, 1965, states that pipes coming out of the steam tunnel have excessive laitance which flakes to a depth of $\frac{1}{4}$ to $\frac{1}{2}$ inch but that the area is not great enough to reject. A memorandum from the assistant project engineer, dated February 18, 1965 (note 45, *supra*) states that there are two types of interior surface crazing neither of which appear severely detrimental to the pipes and which would be a cause for rejection only in case of a failure to take "known corrective action."

by the Bureau were the primary cause of flaking or scaling interiors. We have previously referred to Mr. Murray's testimony that the principal problem at the time of his arrival on the job in January 1965 was considered to be the production of small diameter pipe. An Inspectors Daily Report, dated January 5, 1965, reflects that 1,014 small diameter pipes had been approved for use while 1,129 had been manufactured. The report states that Cen-Vi-Ro was advised that it was doubtful that anymore small diameter pipes would be approved. The project engineer's letter of January 21, 1965 (Exh. 14), expressing concern that small diameter pipe continued to be produced, heightened Cen-Vi-Ro's concern that it would not be allowed to use such pipe (Tr. 887).

Mr. Murray asserted that in an effort to avoid small diameter pipes, the operators had been instructed not to overfill the forms with the consequence that the bores of the pipes were contoured too straight, and water and laitance¹⁴⁵ which surfaced during spinning operations could not be discharged (Tr. 841, 842). He conceded, however, that it was possible to make and that Cen-Vi-Ro had in fact made pipes that neither flaked nor were small diameter as interpreted by the Bureau (Tr. 891, 892). Mr. Herrera explained that in the Cen-Vi-Ro process it was normal to overfill the

¹⁴⁵ Laitance is a scum composed of the finest particles of cement, mostly calcium carbonate, which when dry constitutes a chalky material having little strength (Tr. 178).

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form in the center and to rely on the spiral effect of the roller to distribute the concrete and remove excess material (Tr. 812; accord, Tr. 177 (Peckworth) and Tr. 362 (Franklin)). Mr. Herrera stated that the reason for the flaking was that the inside pipe wall was completed by material that should have been wasted (Tr. 813). He attributed this in principal part to underfilling the forms (Tr. 763). Mr. Hubbard testified that the resident engineer and the chief plant inspector suggested that Cen-Vi-Ro underfill or pour less concrete in the forms (Tr. 1097, 1115, 1117). This testimony was not denied.

Mr. R. C. Borden, Bureau liaison engineer, who visited Cen-Vi-Ro's plant during the period April 20 to 23, 1965, was of the opinion that scaling of interior pipe surfaces was caused by underfilling of the forms permitting entrapment of water and cement between the end rings during spinning and a deficiency in the sand mix (Tr. 1690; Travel Report, dated May 18, 1965, Ex h. 20). An Inspectors Daily Report, dated April 14, 1965, states the belief that the tendency to underfill pipes was a primary cause of mushy pipe interiors. The Government's expert witness testified that underfilling the pipe in order to avoid small diameters would likely result in an excess of slurry on the inside of the pipe (Tr. 2295). In this connection it should be noted that the practice of placing less concrete in the forms, referred to as underfilling, did not mean insufficient concrete to meet

specification requirements as to wall thickness (Tr. 825, 843, 844). Mr. Murray testified that any pipe you spin has some laitance in it (Tr. 892). While it is not clear whether this testimony applied solely to pipes during the spinning operation, its accuracy appears to be recognized by the specification provision concerning freedom from excessive brush marks for removal of water and laitance cited *ante*.

Mr. Peckworth and Dr. Davis testified that the poorest concrete was always on the inside of spun pipe (Tr. 126; Deposition p. 75). While Messrs. Peckworth and McLean were asked and referred to other possible causes of scaling and flaking interiors such as storage under arid conditions,¹⁴⁶ improper mix (too wet), dirty aggregates,¹⁴⁷ improper curing, rapid temperature

¹⁴⁶ Since we have found that cracking most often developed into flaking in the storage yard, it would seem that storage conditions were a prime cause of flaking (see the provisions of the specifications quoted in note 143, *supra*). However, the resident engineer testified as to Cen-Vi-Ro's efforts to prevent flaking (coating the interior surfaces of the pipes with a sealing compound and covering ends of some pipes and placing water inside to preserve moist conditions) which apparently had little or no effect on the flaking and indicated that belief the condition was attributable to drying had been abandoned (Tr. 1914, 1915). While Dr. Davis attributed crazing and flaking to a drying shrinkage associated with a wet mix, Mr. Peckworth indicated that it was unlikely drying would cause flaking (Tr. 180).

¹⁴⁷ At the hearing and on Brief (pp. 66, 67), the Government emphasized Cen-Vi-Ro's alleged difficulties with aggregates and its change of aggregate suppliers. However, the record supports the conclusion that aggregates used by Cen-Vi-Ro were within tolerances allowed by the specifications (Pars. 94 and 95) for deleterious materials (Tr. 557, 915, 916).

changes, and inexperienced machine operators (Tr. 176-180, 2287), we think it significant that 106 final rejects for scaling and bad interiors were manufactured in February, 131 in March, and only eight in April 1965 (Exh. 5Q). It thus appears that there is some merit to Cen-Vi-Ro's contention that the incidence of pipes with severe scaling or flaking interiors declined at or after the time the Bureau relaxed the criteria (April 12, 1965, note 72, *supra*) for determination of permissible internal pipe diameters and that scaling or flaking interiors were not a significant problem thereafter (Tr. 730, 841). We recognize that there is evidence that most pipe with flaking interiors were manufactured on the 20-foot spinner while most pipes with small diameters appear to have been manufactured on the 16-foot spinner (Tr. 632, 674, 675, 839; memorandum of October 27, 1964, Exh. 8; Exh. 5R). The Board finds that the practice of underfilling the forms in order to avoid manufacturing pipes with small diameters resulted in excessive laitance being retained in the pipe and was the principal cause of scaling or flaking interiors.¹⁴⁸

The record reflects that 95 pipes were rejected for scaling prior to

the May 15 inventory (Exh. 59). It will be recalled that numbered paragraph 2 of the letter of May 13, 1965, required the rejection of all pipe with scaling or loose and weak interior surface material. As we have seen, 2,240 pipes were rejected for scaling (tabulation attached to memorandum of May 27, 1965, note 27, *supra*, reflects that 2,162 pipes were rejected for bad interiors) during the May 15 inventory of which approximately 1,579 had previously been accepted. An explanatory note (Special Report, dated May 21, 1965, note 24, *supra*) states that this scaling or flaking had developed since the pipes were accepted.¹⁴⁹

At a meeting with Cen-Vi-Ro representatives on May 26, 1965, Cen-Vi-Ro was advised that a review would be made in the immediate future of all pipes rejected for scaling (Tr. 1686; memorandum, dated May 27, 1965, note 27, *supra*; Travel Report of R. C. Borden, dated June 9, 1965, Exh. 23). While it appears that Mr. Borden, at the time of his second visit to the Cen-Vi-Ro plant (May 24 to 27, 1965), participated in a limited review of approximately 600 pipes rejected for scaling (resulting in a deter-

¹⁴⁸ The Government asserts that the alleged relationship between small diameters and flaking or scaling interiors was first raised by Cen-Vi-Ro representatives in a meeting on August 25, 1966, which was after the completion of pipe manufacture (memorandum, dated September 20, 1966, note 62, *supra*). While the record does not reflect that this relationship was raised with the Bureau prior to the August 25 meeting, memoranda written by Mr. Franklin to Raymond Inter-

national, Inc., state that pipes with poor interior finish resulted from efforts to reduce the number of small diameters (memoranda of April 16 and May 1, 1965, Cen-Vi-Ro Correspondence).

¹⁴⁹ Reflecting obvious concern over the effect of prior acceptance, the contracting officer determined that pipes with scaling or flaking interiors constituted latent defects inasmuch as the scaling frequently progressed and its ultimate extent could not be determined immediately after manufacture (Par. 51, "Findings of Fact"). Cen-Vi-Ro admits that some of the rejections for scaling or flaking interiors relate to latent defects (Exh. 5M, p. C5).

mination that 12 were acceptable with the understanding that any progression of the relatively minor scaling would again be cause for their rejection, Exh. 23), the immediate review of rejected flaking or scaling pipe did not take place. The Government asserts, and the contracting officer found, that this review was postponed at Cen-Vi-Ro's request pending demonstration of the Centrline Process for the repair of scaling or flaking pipe.¹⁵⁰ Cen-Vi-Ro denies requesting a delay in the Bureau's consideration of rejected pipe and asserts that it had never intended to repair any but a small quantity of the badly flaking pipes by the Centrline Process (pp. 26 and 27, Notice of Appeal). The project engineer testified that the Bureau took a second look at rejected pipes with scaling interiors at the time Cen-Vi-Ro wanted them to look, that is after demonstration of the Centrline Process (Tr. 2068). However, somewhat inconsistently he also stated that the Bureau agreed to review scaling pipes after the deterioration had stopped (Tr. 2010).

We find that the terms flaking or scaling were used by the Bureau to describe two types of pipe interiors: cracking and actual flaking and that the Bureau frequently did

not distinguish between the two conditions. We note Mr. Rippon's testimony that the Bureau did not accept flaking pipe because "we wanted to see if we got a progressive failure as it stood out there in the yard" (Tr. 1755). The contracting officer found that interior scaling was a latent defect the evidence of or the ultimate extent of which most frequently could not be determined immediately after manufacture but only after an extended period of storage in the yard (par. 48, Findings of Fact). We also note the statements attributed to Messrs. Crane and Rippon at the July 24, 1965, meeting that the Bureau would reexamine previously rejected pipe with minor scaling and/or surface cracking. In addition, Mr. Ryland of the Bureau's Denver Office is quoted as stating that Bureau inspectors had been instructed to be conservative in the acceptance of pipe with minor scaling or cracked interiors because of the possibility of the cracking or scaling progressing further and that it was obvious from the present inspection there had been little if any, further development in many of the pipe sections (Notes on Meeting of July 24, 1965, note 46, *supra*). The resident engineer testified that the instructions to be conservative in the acceptance of pipe with flaky interiors had been given him by the project engineer and that conservative to him meant "not to accept" (Tr. 1956).

The Board finds that the Bureau's concern that the scaling would pro-

¹⁵⁰ The Centrline Process, which involved the removal of weak material by a high velocity jet of water and installation of a thin mortar lining was demonstrated during the week of July 19, 1965 (Tr. 752, 1915; Inspectors Daily Reports, dated July 19, 20, and 22, 1965, Notes on Meeting of July 24, 1965, note 46, *supra*). The process was considered unacceptable by the Bureau.

gress (*i.e.*, that cracking would develop into flaking) precluded immediate acceptance of the pipe rejected for cracking or flaking¹⁵¹ and that the Centriline Process was intended for repair of only those pipes with actual flaking.¹⁵² While the Government emphasizes that Cen-Vi-Ro was told on several occasions to locate pipes they considered could be reclaimed and that the Bureau would look at these pipes (Brief, pp. 57, 58) the project engineer testified this did not involve pipes with flaky interiors (Tr. 2018).

We find that approximately 1,579 of the pipes rejected for scaling or flaking during the May 15 inventory had previously been accepted. Although an explanatory note written at the time states that the scaling or flaking had developed since the pipes were accepted, there can be no doubt that the interiors on a majority of these pipes could not properly be regarded as scaling or

flaking but had minor interior surface cracking and that these pipes were rejected because of the Bureau's concern the cracking would develop into flaking which did not, in fact, occur. The resident engineer testified that some of the pipes rejected during the May 15 inventory were subsequently accepted because the scaling had not progressed to the point it was detrimental to the pipe (Tr. 1916). It is clear that the Bureau reversed its position as to the acceptability of much of this pipe.¹⁵³ As noted *ante*, 1,920 of the pipes previously rejected for scaling or flaking (the Summary of Pipe Units Reclaimed, Exh. 146, puts the figure at 1,919) were accepted during the reclaim program. While the project engineer expressed the opinion that the reclaimed pipe did not comply with the specifications (Tr. 2023), and the extent of repairs, if any, to these pipes prior to their acceptance or reacceptance is not clear, we think it significant that 1,013 of the pipes previously rejected for scaling were accepted in September 1965 (Exh. 146). This indicates that it is highly unlikely that any substantial repairs were effected to these pipes.¹⁵⁴

¹⁵¹ Mr. Borden's testimony makes it clear that the Bureau had decided prior to the meeting of July 24, 1965, to accept pipes with minor flaking if the flaking did not progress (Tr. 1707, 1708).

¹⁵² We think it significant that letters concerning the Centriline Process written by Cen-Vi-Ro to Raymond International, Inc. (letters of June 4 and 25, 1965, Cen-Vi-Ro Correspondence) refer only to pipes rejected for flaky interiors while at approximately the same time Mr. Hubbard is quoted as saying he intended trying to convince the project engineer that pipes with moon shaped cracks were acceptable (Inspectors' Daily Report, dated June 24, 1965). Cen-Vi-Ro was clearly aware of the two types of interior pipe conditions. We recognize that the statement to the effect that if Cen-Vi-Ro could sell Centriline to the Bureau, it stood to recover nearly 1,800 sections of pipe (letter of July 12, 1965, Cen-Vi-Ro Correspondence) is some evidence that the Centriline Process was intended to apply to all pipes rejected for cracking or scaling.

¹⁵³ Notes of Meeting of July 24, 1965, note 46, *supra*. See also Hubbard letter of August 9, 1965, and Kiesel letter of July 26, 1965 (note 142, *supra*), the latter of which states that Messrs. Rippon and Ryland of the Bureau's Denver office agreed that "crescent shrinkage cracks" were acceptable as long as there is no flaking.

¹⁵⁴ An Inspectors' Daily Report dated July 22, 1965, signed by the chief plant inspector, states that Messrs. Crane, Ryland and Rippon examined minor flaking 54-inch pipe (number not stated) and states the writer's conclusion that these pipes would be acceptable without re-

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The project engineer testified that scaling pipes were accepted after Cen-Vi-Ro developed an epoxy method of repair and the resident engineer indicated that a majority of these pipes required some repair (Tr. 2019, 1957). The resident engineer further stated that pipes with flaking could not be used without repair (Tr. 1913).

The resident engineer's testimony that a majority of these pipes required some repair must be viewed in the light of Mr. Herrera's statement that every pipe, perfect as it may be, needs some repair which he referred to as manicuring (Tr. 735). Mr. Peckworth stated that in many [concrete] pipe plants every piece of pipe is repaired in some particular and that 90 percent of the [concrete] pipe that comes out of some yards has some repair (Tr. 259, 260). The contracting officer found that 620 54-inch pipes (A25, B25 and AB50) were found acceptable after the extent of scaling had been determined (par. 53, Findings of Fact).

The Comparison of Rejected Pipe Remaining in Pipe Yard on June 20, 1966, to Total Production (Exh. 5Q) reflects a total of 352 rejections for scaling and bad interiors. There is no breakdown of the number of pipes rejected for each reason. The

contracting officer found that 252 of these were rejected because of scaling or flaking interiors (par. 50, Findings of Fact). Our count of the Final Inventory of Rejected Pipe (Exh. 152) indicates 110 final rejections for bad interiors and 243 final rejections for scaling or flaky interiors.¹⁵⁵ It appears that 49 of 55 rejections for scaling and bad interiors manufactured up to and including December 31, 1964, were for bad interiors rather than flaking or scaling interiors (Exh. 152). It further appears that four out of thirteen final rejections for scaling or flaking and bad interiors manufactured in January 1965 were for bad interiors and that eighteen of 106 final rejections for these reasons manufactured in February 1965 were for bad interiors. There were 131 final rejections for scaling or flaking and bad interiors manufactured in March 1965 of which nine were rejected for bad interiors. Based on the foregoing, the Board finds that the peak months for the production of pipes with flaking or scaling interiors were late February and March 1965. This finding is confirmed by a chart prepared by appellant which compares the production of small diameter pipe and bad interiors (Exh. 2 of Notice of Appeal, Exh. 6).

The breakdown of pipes examined by Dr. Davis (Exh. 2 of Deposition) indicates that he examined 31 pipes rejected for bad

pairs. An Inspectors Daily Report, dated August 3, 1965, reflects the examination of 142 54AB50 and 54B25 pipe and states that 111 54AB50 and seven 54B25 pipes were either O.K. as is or with minor cleanup and/or epoxy repair. It appears that repair of 54-inch reclaim pipes did not commence until September 1, 1965 (Inspector's Daily Report of even date).

¹⁵⁵ Again based on the assumption that where multiple reasons for rejection are stated, the first represents the primary reason for rejection.

interiors of which eleven were considered acceptable with repairs and twenty were considered to be properly rejected. He apparently made no distinction between pipes rejected for scaling or flaking interiors and those rejected for bad interiors since the list of identified pipes he considered acceptable (Exh. 154) includes two pipes rejected for flaky interiors and four rejected for bad interiors. Although it is clear that the Bureau treated bad interiors and scaling or flaking interiors as separate causes for rejection, the record is not clear as to the types of conditions constituting bad interiors or what were the causes of this defect or defects. In its letter of June 10, 1965 (note 143, *supra*), Cen-Vi-Ro referred to the repair of localized scaling that occasionally occurs as provided in the contract specifications. The reference is to the Concrete Manual and apparently to the provisions (Section 137. (c), Preparation of Imperfections for Repair) providing for the removal of unsound or imperfect concrete.

However, we think that this provision is applicable only to the repair of normally repairable defects as listed in the Manual and may not be construed as authorizing the repair of defects not so listed. While Cen-Vi-Ro asserts that most flaking was of a minor nature and easily repairable, it cites no provision of the Concrete Manual authorizing such repairs and it is clear that the primary thrust of this aspect of its claim is that most of the pipes complied with contract requirements

and should have been accepted (Notice of Appeal, pp. 23-27). Accordingly, we conclude that to the extent the Government permitted the repair of pipes with actual flaking, it did so as a matter of grace rather than of contractual right. This holding makes it unnecessary to consider the question of Cen-Vi-Ro's alleged failure to take known corrective action to reduce or eliminate flaking interiors.

Decision

The specifications as we have seen do not prohibit all interior surface crazing but only that deemed excessive. Among the definitions of "craze" is "to shatter" and in the field of pottery "craze" is defined as "minute cracks on the surface of the glaze."¹⁵⁶ Obviously, "excessive crazing" is a matter of judgment. Construing specifications with similar general language we have regarded the conduct of the parties prior to the dispute as of primary importance.¹⁵⁷ Here we have found that the Bureau did not regard interior surface cracking and even some flaking as a cause for rejection when these conditions were first observed. We have also found that although cracking degenerated into actual flaking on some of the pipes, it was the Bureau's concern that this degeneration might occur on all pipes that led to the rejection of 2,240 pipe units for scaling during the May 15 inventory of which

¹⁵⁶ Webster's New International Dictionary, 2nd Edition.

¹⁵⁷ *Compec*, (a Joint Venture), IBCA-573-6-66 (note 43, *supra*).

approximately 1,579 had previously been accepted. Bureau personnel at the time characterized the interiors of many of the pipes rejected for scaling as "minor interior surface cracking" and reversed their position as to the acceptability of these pipes when it became evident the cracking was not progressive. We think it evident that conforming materials may not properly be rejected out of concern that the materials may degenerate into an unacceptable status at an unspecified future date.¹⁵³

The next question is the number of such pipe which were improperly rejected. The contracting officer found that 620 pipes (54A25, B25 and AB50) rejected during the May 15 inventory were accepted after the extent of scaling had been determined. We have treated similar findings of the contracting officer as evidentiary admissions where not rebutted.¹⁵⁹ However, we need not predicate our decision on that

ground. We have determined that it is unlikely that any substantial repairs were effected to 1,013 of these pipes which were reaccepted in September of 1965. We conclude that these pipes should not have been rejected.

The appeal as to scaling or flaking pipe is sustained as to disruption costs associated with the interim wrongful rejection of 1,013 pipes and is otherwise denied. The amount of the equitable adjustment will be determined in a subsequent portion of this opinion.

Claim for Surplus Cages

By letter, dated May 10, 1966 (Exh. 5J), Cen-Vi-Ro submitted a claim in the amount of \$52,591.05 for 364 54AB50 surplus cages. The letter alleged that 24 54A25, 185 54B25 and 670 54AB50 pipes were rejected during the May 15 inventory. The Government's tabulation (Exh. 60) confirms that 879 54-inch pipes of the listed classes were rejected for all causes during the May 15 inventory. The letter stated that appellant began the manufacture of replacement steel cages on June 8, 1965, for 54AB50 pipes (which cages could also be used for 54A25 and 54B25 classes of pipe), and that the Bureau's acceptance of over 400 of these pipes after manufacture of replacement cages had been completed resulted in a surplus of 364 54AB50 cages.¹⁶⁰ As we have

¹⁵³ Or as stated by Cen-Vi-Ro, "The Government has a right to reject a pipe unit because of an alleged latent defect but if the Government's judgment proves to be wrong [and there is no rejectable defect, latent or otherwise], then the Government must bear the burden of its error." Notice of Appeal, p. 24. *Of. Mann Chemical Laboratories, Inc. v. United States*, 182 F. Supp. 40 (D.C. Mass., 1960), (Government's delay in accepting water purification tablets until an independent analysis revealed that brown spots on tablets were not detrimental held reasonable and not a breach of contract.) The distinguishing factor is that the brown spots were a foreign condition while the instant contract did not prohibit all crazing but only that deemed excessive.

¹⁵⁹ *Roy L. Matchett*, IBCA-828-2-70 (February 26, 1971), 71-1 BCA par. 8722; *Steenberg Construction Company*, IBCA 520-10-65 (May 8, 1972), 79 LD: 158, 211; 72-1 BCA par. 9459 at 43, 967.

¹⁶⁰ Photos of wasted reinforcing steel and completed cages appear on p. 46, Volume III, Exh. 40.

seen in connection with the claim for scaling and flaking interiors, the contracting officer found that 620 54-inch pipe of the listed classes were accepted after the extent of scaling had been determined.

The claim was computed on the basis that there were 270,561 pounds of steel in the surplus cages which had a completed value of \$.15 per pound. Mr. Peterson, who was principally responsible for the computation of Cen-Vi-Ro's claims, testified that \$.15 a pound represented the cost of the cages shown on Cen-Vi-Ro's books (Tr. 1007, 1078). After allowing a salvage credit of \$.005 per pound, the direct loss was computed at \$39,231.35. To this figure, Cen-Vi-Ro added a lump sum of \$6,500 for disruption of production schedules, cage machine changeovers, rehandling of cages, steel, etc., and 15 percent for overhead and profit.

The contracting officer emphasized the fact that Cen-Vi-Ro representatives were advised that the Bureau would review pipes rejected for scaling, found that Cen-Vi-Ro requested delay of this review pending demonstration of the Centriline Process and denied the claim for the reason that Cen-Vi-Ro's proceeding with cage manufacture under such circumstances was a voluntary and unnecessary act.

Cen-Vi-Ro cites paragraphs (b) and (c) of Clause 10, Inspection and Acceptance, requiring it to promptly replace rejected material or workmanship and alleges that it could not delay manufacture of re-

placement cages for an extended period of time on the assumption that a portion of the rejected pipe might eventually be accepted. It is true that Messrs. Murray and Herrera admitted that they considered a percentage (Mr. Herrera indicated that he thought up to 25 percent of the pipe rejected in the May 15 inventory would be reclaimed with minor repair) of the rejected pipe would ultimately be accepted (Tr. 735, 749, 780, 885). Examination of the contract (Exh. 1) indicates that in excess of 4,900 54-inch pipes of the listed classes were required for DC-6000. A tabulation attached to a memorandum from the resident engineer, dated March 8, 1965 (Exh. 16), reflects that 2,425 pipes (54A25, B25 and AB50) were required to meet pipe laying requirements through July 31, 1965. While the tabulation indicates that 550 pipes in excess of laying requirements through July (laying requirements for this size and classes of pipe beyond July are not stated) had been manufactured, 172 of these pipes had been rejected prior to May 15, 1965 (Exh. 59). As we have found, 879 additional pipes of this size in these classes were rejected during the May 15 inventory. The Board finds that Cen-Vi-Ro's decision to resume manufacture of cages for these pipes was reasonable.

Decision

Since we have found that Cen-Vi-Ro's decision to resume manufacture of 54AB50 cages was reasonable, the issue is whether at least 364

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54-inch pipes (classes A25, B25, and AB50) rejected during the May 15 inventory complied with the specifications. In view of our finding that 1,013 pipes were wrongfully rejected during the May 15 inventory, we have no hesitation in answering this question in the affirmative.

We accept Cen-Vi-Ro's direct cost figure for these cages less the \$.005 per pound salvage credit. However, there is no evidence to support the lump sum of \$6,500 claimed for disruption of production schedules, re-handling of cages, steel and etc. The appeal as to surplus cages is sustained in the amount of \$39,231.35. The matter of overhead and profit is considered *infra*.

Seams

This aspect of the claim involves pipes with grout leakage at form seams. In addition to provisions of the specifications quoted previously providing for adequate repair of forms and for discarding defective forms (note 126, *supra*), Subparagraph 67.e.(2) of the specifications provided in pertinent part:

All forms shall be sufficiently tight with suitable gaskets provided at all form joints and gates to prevent leakage of mortar.

Paragraph 4 of the resident engineer's memorandum of May 24, 1965, provided:

4. Grout leakage at seams may be repaired before tests are made if cracks are not evident after all defective concrete is removed. The repaired pipe will be rejected if it fails to pass the required test.

Among the defects normally repairable in accordance with the Concrete Manual is: "3. Roughness due to form-joint leakage."

Paragraph (h) of Section 137 of the Concrete Manual provides in part:

Occasional pipe having lesser repairs capable of affecting the performance of the pipe if the repairs are not sound shall be tested to assure the security of such typical lesser repairs.

While it is possible that some final rejects for seam joint roughness are included in the 91 final rejects for miscellaneous reason (Cen-Vi-Ro's tabulation of 1,744 final rejects includes 63 for miscellaneous reasons, Exh. 5N, p. 10), there is no evidence that this is so. Our examination of the Final Inventory of Rejected Pipe (Exh. 152) reveals a total of eight pipes where bad seams or seam leaks were listed as among the reasons for rejection. None of the identified pipes examined by Dr. Davis (Exh. 154) list seam leaks or bad seams as a cause for rejection.

Since Cen-Vi-Ro's claims under this heading appear to be limited to alleged excessive testing on pipes with repairs at seams, we will consider this aspect of the claim under the heading "Testing Criteria."

Core Holes

This claim involves pipes in which holes were drilled to obtain samples of concrete. It will be recalled that the chief plant inspector's memorandum of March 31, 1966 (note 29, *supra*), required the rejection of pipes with more than two repaired

core holes. Pipes with two repaired core holes were acceptable if the core holes were more than six feet apart and if the pipe passed the hydrostatic test. In its letter of protest, dated April 18, 1966 (note 111, *supra*), Cen-Vi-Ro conceded that the Concrete Manual did not provide for the repair of core holes but alleged that it had for many years made a practice of repairing such holes regardless of their position in the pipe. The project engineer's reply of May 9, 1966 (note 111, *supra*), stated flatly that pipes in which core holes had been drilled to obtain samples could not be accepted.

In the Appendix to its claim (Exh. 5N, p. 9), Cen-Vi-Ro admits that neither the specifications nor the Concrete Manual provide for the repair of pipes with core holes. However, Cen-Vi-Ro asserts that it is industry practice to allow the repair of such pipe without testing. There is no evidence to support this assertion.

The contracting officer found that no pipes were rejected in accordance with the criteria in the chief plant inspector's memorandum (par. 61, Findings of Fact). He determined that one pipe with two core holes was downgraded because of leaks at the repaired area on hydrotest and that only one pipe with six core holes was rejected for core holes. We find only three pipes in the Final Inventory of Rejected Pipe (Exh. 152) in which core holes are listed as among the reasons for rejection. One of these pipes is indi-

cated to have six core holes and a bad interior (66AB50 x 20, No. 13D, mfg. 3-3-65) and one is indicated to have five core holes and a flaky interior (66AB50 x 16, No. 9N, mfg. 6-8-65). The remaining pipe (54B75, No. 3N, mfg. 6-4-65) is indicated simply to have been cored and also to have a rocky bell.

Decision

Cen-Vi-Ro concedes there is no provision of the Concrete Manual or the specifications providing for the repair of core holes. However, Cen-Vi-Ro asserts that it is industry practice to permit the repair of such holes without testing. While there is no doubt that industry practice may properly be applied to determine the meaning of contract language notwithstanding that the contract is unambiguous,¹⁶¹ we do not think that such trade practice even if it existed, would in the circumstances present here, justify a holding that all core holes were repairable. In any event, there is no evidence of such a practice. It follows that the claim with respect to core holes must be and hereby is denied.

Testing Criteria

The contract (Subparagraph 67.i.(1)) required hydrostatic pressure tests in each test period on one percent, but not less than one pipe unit of each size and class of pipe, and hydrostatic joint tests on one-

¹⁶¹ *Gholson, Byars & Holmes Construction Company v. United States*, 173 Ct. Cl. 374 (1965); *WRB Corporation, et al. v. United States*, 183 Ct. Cl. 409 (1968).

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half percent, but not less than one joint, for each size and class of pipe. The length of the test period, for the purpose of selecting representative pipe units for tests, was set at the number of days the plant of the manufacturer was normally operated in a calendar week. The length of the test period could be reduced at the discretion of the contracting officer if there were a significant change in the materials used in the pipe, in the mix proportions, in production procedures or if there were numerous shutdowns of the pipe manufacturer's plant due to failures of the plant or equipment. The specifications (Subparagraph 67.i.(2)) required that the pipe be soaked at least three hours under ten p.s.i. prior to conducting the hydrostatic test. Pipes were to be tested at 120 percent of the specified internal pressure of the class for which the pipes were designed for 20 minutes and if the unit selected as representative of the lot failed the test (leaked or evidenced cracks extending under pressure), the contractor was entitled to have two other pipes selected by the contracting officer from the same lot tested. If these pipes passed the test, referred to as check tests, the lot was accepted. If either of these pipes failed, the lot would not be accepted until each pipe in the lot passed the test.

It is, of course, more expensive to require testing of each piece of pipe (Tr. 1765-1767). The Government's expert witness, Mr. McLean, testified that it was normal and custom-

ary to require a hydrotest on every section of concrete pressure pipe (Tr. 2324, 2325). It is therefore clear that by not requiring a hydrostatic test on each pipe, the Bureau obtained a more economical line and accepted the risk, subject to rights under the Inspection and Acceptance and Maintenance Warranty Clauses, that some flawed or defective pipes might not be detected.

Cen-Vi-Ro contends that the Bureau consistently held the contractor to a standard of pipe quality different from that called for by the contract (Exh. 5L, p. 2; Exh. 5M, p. C2). Cen-Vi-Ro asserts that the Bureau refused to permit the repair of many pipes which were repairable in accordance with the Concrete Manual prior to hydrostatic testing and thus achieved additional depth in lot testing. We have found that this assertion is correct as to repairable rock pockets and longitudinal and circumferential cracks. Cen-Vi-Ro complains that Bureau representatives visually selected the most questionable pipes to be tested rather than using random sample techniques. It is further alleged that units were rejected arbitrarily or were placed in limbo whereupon the contractor had the burden of proving the pipes were satisfactory which could only be done by a hydrostatic test (Notice of Appeal, pp. 29-36). Cen-Vi-Ro further asserts that Bureau inspectors were inexperienced in concrete pipe, that the project engineer and the chief plant inspector had previously been associated with a prior contract of

the Canadian River Project (Specifications No. 5863) wherein each pipe was required to be tested and that it was difficult for them to adjust to a contract requiring only lot testing. It is further alleged that contrary to the contract, Bureau inspectors substituted hydrostatic testing for visual judgment and desired to have the maximum possible number of pipes hydrotested.

According to Cen-Vi-Ro's figures, there were 1,680 special hydrostatic tests (Exh. 5N, p. 11). Cen-Vi-Ro is apparently claiming the cost of conducting 1,483 of these tests. Government figures indicate that there were 764 lots, 767 lot tests of individual pipes of which 106 failed, 165 check tests representing lots of which 38 failed, 95 check tests of individual pipes of which 18 failed and 1,801 special hydrostatic tests of which 821, or 45.6 percent, resulted in failure.¹⁶² The total number of hydrotests (lot, check and special) was 3,171. As we have indicated *ante*, "special hydro" was the name given to hydrostatic tests other than lot tests which were not required by the contract. The contracting officer found that special hydro tests were permitted to be performed by the Government on

pipes with imperfections which could not be represented by lot or check tests (par. 65, Findings of Fact). The Government has stipulated that no provision of the contract authorized special hydrostatic tests (Tr. 343). This stipulation must, of course, be viewed in the light of the Government's position that the Concrete Manual is not a part of the contract. We note Mr. Herrera's testimony that tests on repaired pipes in accordance with the Concrete Manual were considered special hydro tests (Tr. 704, 705).

Cen-Vi-Ro computed its bid on the basis that approximately three percent of 30,000 or 900 pipes would be tested under DC-6000 and that one test stand capable of testing two pipes at a time would be sufficient.¹⁶³ In view of the fact that a plant for the manufacture of the pipe had to be constructed, that it is normal in the operation of a newly constructed plant to have a considerable period elapse before satisfactory pipes are produced (note 106, *supra*) and in view of the provisions of the contract requiring the testing of each pipe in the lot if either of the check tests resulted in failure, we think it clear that the assumptions on which the bid was based were too sanguine, to say the least. As we have seen, hydrostatic tests actually conducted were approximately 3½ times the number contemplated at the time the bid was prepared.

The original test equipment ca-

¹⁶² Hydrostatic Test Study, Exh. 64. We have some difficulty with the accuracy of this percentage since it is based on adding into the total of 1,589 special hydrostatic tests, the total (212) of a column entitled "Repair and Re-Hydro." Mr. Dale Powell, who prepared the Study, testified that the 212 represented tests in addition to the 1,589 (Tr. 1654); yet an explanatory note appended to the Study states that these were pipes which initially failed hydro and that retests, if made, are indicated in the failure column or in the "Downgraded and accepted" column.

¹⁶³ Tr. 337, 338, 635, 636. Working papers upon which the bid was calculated are not in the record.

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pable of testing two pipes at a time, proved to be inadequate. The need for additional hydrostatic testing equipment was apparent by October of 1964 (Tr. 338, 526, 527, 680; memorandum, dated October 22 and letter dated October 30, 1964, Exhs. 8 and 9). Cen-Vi-Ro installed additional testing equipment at a date not certain from the record.

Mr. Franklin testified that the additional testing came about because of special hydrotests (Tr. 339). He stated that the practice originated at an early date in pipe production on pipes which were not acceptable to the Bureau based on visual examination and not finally rejected in order that a determination of whether the pipe was acceptable could be made. He further stated that one of the purposes of special hydrotests was to convince Bureau inspectors that pipes with apparent minor defects were sound (Tr. 340, 341). He conceded, however, that in the initial stages of pipe production special hydros were the result of a joint effort by Cen-Vi-Ro and Bureau personnel, that such tests were a means of determining the viability of repaired pipes¹⁶⁴ and that some of the early special hydros were conducted at Cen-Vi-Ro's initiative (Tr. 343, 529, 531). He also admitted

that Cen-Vi-Ro personnel on occasion marked pipe for special hydro and that there was a relationship between hydrostatic tests and the number of defective pipes (Tr. 534, 535). Testimony that Cen-Vi-Ro personnel at times marked pipes for special hydro was confirmed by Mr. Herrera, Mr. Thomas, chief plant inspector for the Bureau, and by contemporaneous memoranda (Tr. 705, 1409, 1410; Inspectors Daily Reports, dated May 4 and 11, 1965). The Hydrostatic Test Study (note 162, *supra*) reflects that there were a total of 42 pipes tested for Cen-Vi-Ro quality control of which 15 failed the test. The Board finds that Cen-Vi-Ro participated in and agreed to the practice of conducting special hydrostatic tests on otherwise doubtful pipes in the early stages of production.

The chief plant inspector testified that pipes upon which the Bureau required special hydrostatic tests were pipes with obvious defects which would otherwise have been rejected.¹⁶⁵ However, he also testi-

¹⁶⁴ The earliest indication of special hydrostatic tests is an Inspectors Daily Report, dated June 27, 1964, which states that four pipe joints were tested: one of which had a patched bell, one had a slump patch, one had minor repairs to bell and barrel and one had drummy areas at gyro rings. Thereafter the practice of marking pipes for special hydro is mentioned frequently in Inspectors Daily Reports.

¹⁶⁵ Tr. 1399, 1408. We note at least three instances of pipes marked for special hydro because of alleged improper cure (Inspectors Daily Reports of August 31, September 2 and October 27, 1964). It is at least doubtful that these pipes had obvious defects. In any event, the test established by the contract for proper cure was compressive strength of concrete cylinders. See also Inspectors Daily Report, dated November 20, 1964, which indicates pipes were subjected to special hydros because of being vibrated only during charging of the form and because of being spun while the form was only one-half full of concrete. A memorandum, dated March 25, 1966, written by Mr. Herrera, stated that although four 20-foot pipes manufactured on March 18, 1966, passed hydrostatic tests, the Bureau required four more pipes of the quantity manufactured

fied that the Bureau required special hydros because they questioned the seriousness of the defect and to give the Bureau another means of judging the extent of the defect (Tr. 1400, 1511, 1512). As we have seen, most pipes with gyro area concrete were required to be tested as a condition of their acceptance. If the pipes passed the test they were generally accepted without the necessity of repairs unless the Bureau questioned the structural soundness of the pipe (Tr. 1400). The Government asserts that this resulted in undoubted savings to Cen-Vi-Ro (Brief, p. 89). The Bureau also required hydrostatic tests on pipes with major repairs such as repairs to bells and spigots, fallouts, impact damage and longitudinal and circumferential cracks in order to test the repaired areas (Tr. 1399, 1400, 1412). If the repairs were properly classified as major, this practice was, of course, fully in accord with the Concrete Manual.

An Inspectors Daily Report, dated December 7, 1964, indicates that 462 pipes had been marked for special hydro as of that date, that 52 had passed and that there were 410 remaining to be tested. The number of pipes requiring special hydrostatic tests had increased to 583 as of February 12, 1965 (memorandum, dated February 18, 1965, note 45, *supra*). The Cumulative Daily Pipe Record (note 59, *supra*) reflects that the number of

on that date to be hydrostatically tested because one of the pipes developed a longitudinal crack at 50-foot head after the test period of 20 minutes had elapsed.

pipes marked for special hydro had increased to 668 as of May 14, 1965. Page 4 of the Special Report, dated May 21, 1965 (note 24, *supra*), states that 377 special hydro tests had been conducted through May 15, 1965, of which 178 resulted in failure. The report also indicates that there were 231 rejects for failure to pass the hydrostatic test out of a total of 631 tests, including lot, special and retests, representing 2.17 percent of 10,639 pipes produced through May 15, 1965. It appears that the number of pipe marked for special hydro was decreased to 404 as a result of the May 15 inventory (Tr. 1607, 1608; tabulation attached to memorandum, dated May 27, 1965, note 27, *supra*). Mr. Thomas testified that the decrease came about because pipes previously marked for special hydro were rejected (Tr. 1608). Of course, any such decrease was temporary since Cen-Vi-Ro was required to conduct hydrostatic tests on many of the rejected pipes in order to obtain their acceptance. While we have some doubts in the matter, we accept as accurate the number (1,801) of special hydrostatic tests shown on the Hydrostatic Test Study (note 162, *supra*). There is no persuasive evidence of the number of these tests which were for the purpose of testing major repairs. However, we note that Cen-Vi-Ro lists 153 special hydros under DC-6000 as "repair tests" (Exh. 5N, p. 11). Mr. Peterson testified that these were tests on pipes with major repairs (Tr. 1008, 1009). This figure appears to be low

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based on Cen-Vi-Ro's evidence of pipes marked for major repairs as of May 7, 1965 (note 59, *supra*). Results of these tests are not shown by the record.

As indicative of the Bureau's attitude of desiring the maximum amount of hydrostatic testing, Cen-Vi-Ro points to the testimony of Mr. Hubbard that he was told by the project engineer in May of 1965 that if it was up to him all pipe sections on the job would be hydrotested (Tr. 1097, 1118, 1119). The project engineer testified that Mr. Hubbard complained as to the great number of hydrostatic tests and admitted inquiring of Mr. Hubbard as to what it would cost to hydrostatic-test all pipes (Tr. 2031). He stated that he did so because of concern over the large number of patched and repaired pipes being placed in the line. The memorandum from the assistant project engineer dated February 18, 1965 (note 45, *supra*), states in part "Inspection appears adequate and special hydros and repairs should be requested to maintain control of quality of finished pipe." A memorandum, signed by Mr. Herrera, dated November 8, 1965 (Cen-Vi-Ro Correspondence), states that inspection crews are needlessly selecting excessive joints for special hydros. Mr. Hubbard was of the same view (Tr. 1106). The project engineer is reported to have advised the chief plant inspector to mark some pipe for special hydro in order to obtain a better check on the pipe since several 20-foot pipes representing lot tests had recently failed

(Inspectors Daily Report, dated August 17, 1965, Exh. 100).

The project engineer also considered that all pipe with circumferentially cracked spigots should be hydro-tested notwithstanding the crack appeared on only one side of the pipe and that test results on pipes with this kind of defect manufactured recently had been good (Inspectors Daily Report, dated November 8, 1965). Another indication of the Bureau's attitude toward hydrostatic tests is that in a discussion concerning selection of pipes as representative of the lot for lot tests, Cen-Vi-Ro was advised that if the best appearing pipe was selected, all that appeared to be less than the best would be marked for special hydro and that increasing the lot test period would also result in more special hydros (Inspectors Daily Report, dated December 30, 1964. See also note 165, *supra*.)

Mr. Franklin testified that Cen-Vi-Ro's start-up problems were aggravated by an excessive number of special hydro tests (Tr. 349, 350). While he conceded that he made no written protest to the Bureau of the practice of conducting special hydro tests (Tr. 532), we find that he verbally protested to the chief plant inspector that the Bureau was rejecting and special hydroing too many pipes (Inspectors Daily Report, dated September 17, 1964). Mr. Murray confirmed that there were verbal protests of a number of special hydros (Tr. 846). It is, therefore, clear that the Bureau was aware at a relatively early date in

pipe production of Cen-Vi-Ro's dissatisfaction with the large number of hydrostatic tests (Tr. 759, 2031; memorandum dated February 18, 1965, note 45, *supra*, Inspectors Daily Reports, dated February 6, June 1, and 29, 1965. See also Special Report, dated May 21, 1965, note 24, *supra*). Cen-Vi-Ro recognized the practice of conducting special hydrostatic tests when it requested reduction of the soak period for such pipe (letter of November 30, 1964, Exh. 12). Cen-Vi-Ro's request was approved by the Bureau in a letter, dated December 30, 1964 (Exh. 13). By letter, dated April 6, 1965 (Exh. 18), Cen-Vi-Ro requested approval to eliminate, at its option, the soak period on all special hydrostatic test pipes. The letter concluded with the following statement:

By eliminating the soak period, more questionable pipe can be proven to be adequate and meeting all specification requirements.

This request was approved by the Bureau.¹⁶⁶

It might be considered peculiar that appellant did not specifically raise the issue of excessive special hydrostatic tests in its letter of June

¹⁶⁶ Letter of May 19, 1965 (Exh. 5F). While Cen-Vi-Ro's request to eliminate the soak period was in terms limited to special hydro pipe, the project engineer testified (Tr. 2024) and the contracting officer found (par. 69, Findings of Fact) that the waiver applied to all hydrostatic tests. It apparently applied to RCP pipes under DC-6130 also. There is some evidence that the elimination of the soak period contributed to the high incidence of test failures on pipes stored in the yard for extended periods (Herrera memoranda, dated March 23 and May 31, 1966, Cen-Vi-Ro Correspondence).

10, 1965, which placed the Bureau on notice that Cen-Vi-Ro considered that the letter of May 13 effected changes to the specifications and would increase contract costs. However, Cen-Vi-Ro was responding directly to the Bureau's May 13 letter and the only reference to additional testing in this letter is that all pipes having shorter longitudinal cracks, that is less than substantially the full length of the pipe, must be hydrostatically tested. There is no evidence that Cen-Vi-Ro was aware at this time of the resident engineer's memorandum of May 24, 1965, to pipe inspectors concerning special hydrostatic tests. It is, of course, clear that Cen-Vi-Ro complained it was required to test far more pipe than required by the specifications at the meeting of July 24, 1965 (page 8, Notes on Meeting, note 46, *supra*). Cen-Vi-Ro again recognized the practice of special hydrostatic testing when it protested what it regarded as a seven-day time limit on retesting formerly rejected pipes imposed by the chief plant inspector's memorandum of March 31, 1966, which pipes were being tested as part of the reclaim program to prove their competence (letter of April 18, 1966, note 111, *supra*). Since the Bureau was clearly aware of Cen-Vi-Ro's position that it was being required to perform too many special hydrostatic tests and since we regard Cen-Vi-Ro's letter of June 10, 1965, as sufficiently broad to encompass a claim for any alleged changes stemming from the Bu-

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reau's May 13 letter (it is clear that the resident engineer's memorandum of May 24 was based on the May 13 letter), the Board finds that Cen-Vi-Ro's failure to protest in writing the number and practice of special hydrostatic tests does not preclude the assertion of the instant claim.¹⁶⁷

As high as 64 percent of pipes subjected to special hydrostatic tests for individual defects (gyro area concrete) failed the tests while 45.6 percent of all pipes so tested failed the tests (Hydrostatic Test Study, Exh. 64). The study indicates that approximately 86 percent of tests on pipes representing lots and 77 percent of pipes involved in check tests passed the tests. The Bureau has recognized that the failure rates would be higher if each pipe was tested (p. 4, Special Report, note 24, *supra*). Cen-Vi-Ro, as we have seen, objected to testimony concerning test failures and by implication to the introduction of the test study in the absence of a clear definition of failure in the contract. Cen-Vi-Ro's position is based on the final sentence of Subparagraph 67.i.(2) of the specifications which provides that "Slow forming beads of water that result in minor dripping which can be proven to seal and dry within one week while under the prescribed test pressure will be considered acceptable." Cen-Vi-Ro therefore asserts that pipes

which would heal with seven days cannot be classified as failures.¹⁶⁸ Because of limited test facilities, Cen-Vi-Ro could not, as a practical matter leave pipes on the test stands for extended periods of time (Tr. 866, 1104).

We have little difficulty in concluding that Subparagraph 67.i.(2) of the specification which provides in part that pipes shall withstand the specified internal pressure for at least 20 minutes without cracking and without leakage appearing on the exterior surface establishes adequate criteria for determining failure. We also readily agree with Cen-Vi-Ro that pipes which exhibited minor dripping on the test stand but which healed and ceased to drip within one week were acceptable insofar as hydrostatic tests are concerned.¹⁶⁹ However, we think it

¹⁶⁸ While the Bureau occasionally accepted pipes which dripped on the test stand on the basis of a judgment the pipes would heal (Tr. 864, 865, 1406, 1407, 1853; Inspectors Daily Report, dated January 18, 1965), as a general rule such pipes were rejected unless they healed while under the prescribed test pressure within a one-week period (Tr. 702, 865, 909, 1406; Inspectors Daily Report, dated July 30, 1964).

¹⁶⁹ By letter, dated January 20, 1965 (furnished in response to the Board's call of August 18, 1971), the Chief Engineer authorized the acceptance of pipes under Specifications DC-6000 in accordance with the final sentence of Subparagraph 77.i.(2), Specifications DC-6130, which reads, "Where slow forming beads of water result in minor dripping, the pressure may be released and the pipe unit may be retested within 1 week and if no dripping is evident during retest, the pipe unit may be accepted for use." The letter described the requirement that the pipe remain under pressure as unintended and unnecessary. There is only fragmentary evidence (Inspectors Daily Report, dated August 30, 1965) of any recognition of this authorization prior to the chief plant inspector's memorandum of March 31, 1966 (note 29, *supra*).

¹⁶⁷ It is noteworthy that none of the written protests by Cen-Vi-Ro resulted in any written modification of the May 13 letter and directives based thereon.

clear that whether pipes were tested in accordance with the specification as originally written or under the Chief Engineer's authorization (note 169, *supra*), the burden was on Cen-Vi-Ro to demonstrate that pipes which initially dripped on the test stand had healed when retested. The only persuasive evidence of dripping pipes healing is the test on representative sections referred to by Mr. Hubbard and two pipes referred to in Inspectors Daily Reports.¹⁷⁰

Although a memorandum written by Mr. Herrera expresses the opinion that a high percentage of hydro test results were called failures where marginal results could have been classified as satisfactory (memo of May 13, 1966, Cen-Vi-Ro Correspondence), there is no persuasive evidence to support Cen-Vi-Ro's allegation that the Bureau improperly classified as failures pipes undergoing hydrostatic tests which were not leaking as defined in the specifications.¹⁷¹ On this evi-

dence we find that Cen-Vi-Ro's objections to the Hydrostatic Test Study are not well taken. We accept as *prima facie* valid the indicated failure rates of pipes undergoing hydrostatic tests insofar as methods of conducting the test and results of the tests are concerned. However, it should be emphasized that there is uncontradicted evidence that uncertainty as to whether particular concrete pipes would pass the hydrostatic test is normal.

Mr. Murray, who had 29 years' experience in concrete pipe production, testified that many pipes which "looked good on the surface" leaked at the gyro areas on hydrostatic tests while some with apparent voids did not.¹⁷² He asserted that this could happen any time as well as in the rest of the pipe wall and that he did not understand how anyone could ever be certain about any wall of any pipe. It should also be emphasized that there is evidence that an undetermined number of pipes which were tested for one reason failed for another reason.¹⁷³ In

¹⁷⁰ Note 80, *supra*. In its Notice of Appeal (Exh. 6, p. 16), Cen-Vi-Ro refers to tests on 200 pipes having gyro area concrete which healed within seven days. These tests are allegedly represented by a tabulation furnished on discovery and stipulated into evidence (Exh. 129). However, the tabulation does not indicate the length of time the pipes were on the test stand, the test results are not self-explanatory and no testimony with respect thereto was offered at the hearing. We note that several pipes (e.g., 66A75 X 20, Nos. 5N and 7N, mfg. 5-6-65 and 66AB50 X 20, No. 9D, mfg. 12-9-64) are indicated to have been rejected for leakage at gyro areas (pp. 1 and 18, Vol. II, Exh. 40), but are not included in the Final Inventory of Rejected Pipe (Exh. 152). It is probable that these pipes, among others, healed and were accepted.

¹⁷¹ Subparagraph 67.1(2) of the specifications provides that moisture appearing on the surface of the pipe in the form of beads or

patches will not be considered leakage. Cen-Vi-Ro asserts that the Bureau classified wet and sweating areas as leakage (Appendix I, Claims on DC-6000, Exh. 5N, p. 1). However, we note that Rejection Certifications (note 88, *supra*) reflect disagreement over whether leaking pipes would heal, but not over the classification of the pipes as leaking.

¹⁷² Tr. 953, 954. Mr. Murray's testimony is supported by the fact that some pipes tested for gyro concrete did not leak at the gyro areas, but did leak at areas which appeared sound (Tr. 1407; Inspectors Daily Reports, dated December 16, 1964, and July 9, 1965).

¹⁷³ A memorandum, dated May 13, 1966, written by Mr. Herrera states that this occurred in many cases (Cen-Vi-Ro Correspondence). This was supported by Mr. Franklin (Tr. 537). Mr. Dale Powell testified that a pipe which failed the test was listed under the condition which it failed, which would not

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view thereof and since we have found that certain restrictions on repairs to pipes prior to testing cannot be justified, *e.g.*, longitudinal and circumferential cracks of any degree, we think that the results of hydrostatic tests, as an indication of the quality of the pipes, must be viewed with skepticism.¹⁷⁴

Cen-Vi-Ro also attacks the results of special hydrostatic tests upon the ground that the tests should have been conducted at the service head in accordance with Section 137, par. (h) of the Concrete Manual, rather than at 120 percent thereof and that the pipes should not have remained under pressure for 20 minutes (Notice of Appeal, p. 20). There is no mention of this contention in the claim documents and it appears to have been raised for the first time in the Notice of Appeal. The obvious purpose of testing repaired pipes is to test the efficacy of repair and it would seem to be anomalous indeed that repaired pipes were to be tested at a lower pressure than representative units of unrepaired pipes. We have found that Cen-Vi-Ro participated in and agreed to the practice of conducting

special hydrostatic tests on otherwise doubtful pipes in the early stages of production. Cen-Vi-Ro recognized that special hydrostatic tests should be conducted at 120 percent of service head for 20 minutes in its letter of November 30, 1964 (Exh. 12), wherein it requested approval to reduce the soak period for special hydro pipes from three hours to 1½ hours. The Board finds that Cen-Vi-Ro acquiesced in and agreed to the practice of conducting special hydrostatic tests at 120 percent of service head for 20 minutes.

We have found that the rejection during the May 15 inventory of 93 previously accepted pipes which exhibited evidence of gyro area concrete was improper. These pipes were reaccepted after passing hydrostatic tests. We find that these tests were excessive and should not have been required. The record indicates that there were a total of 291 pipes tested for gyro area concrete.¹⁷⁵ This total is pipe units tested and not necessarily the number of tests. Although it is clear that most, if not all, pipes exhibiting gyro area concrete were subjected to hydrostatic tests as a condition of their acceptance, we have found that Cen-Vi-Ro continually failed to take corrective action to reduce or eliminate gyro area concrete prior to the end of July 1965. Thus the Bureau may not be faulted for re-

necessarily be the reason for the test (Tr. 1562). We note that captions under photos of several pipes state that pipes being tested for unconsolidated gyro ring areas or form seams developed cracks during the test (See pp. 2, 33, 70, 71, 80, 96 and 116. Vol. I, Exh. 40).

¹⁷⁴ We recognize that there is testimony to the effect that some pipes were tested as many as five times (Tr. 1410). Although we accept this testimony as accurate, it is clear that these were isolated rather than regular occurrences and we conclude that the necessity for such tests was likely due to inability to maintain particular pipes on the test stands for long periods.

¹⁷⁵ Hydrostatic Test Study, note 162, *supra*. This figure as well as others hereinafter stated as to the number of pipes tested for particular defects must be viewed with the caveat that failing pipes were listed under the condition under which they failed.

fusing to permit the repair prior to testing of pipes exhibiting gyro area concrete which were manufactured prior to July 31, 1965.

The record indicates that 153 pipes were tested for circumferential cracks in the barrel, as distinguished from the spigot, of which 51 resulted in failure.¹⁷⁶ All but eight of the 51 pipes which initially failed the tests were subsequently accepted (note 124, *supra*). Since it is clear that repairs to circumferential cracks were not permitted by the Bureau after May 13, 1965, we conclude that these pipes healed sufficiently to pass when retested. There were 271 pipes with pulled or cracked spigots (270 of which were 16-foot pipes) subjected to special hydrostatic tests of which 124 resulted in failure. The number failing is only two less than the number finally rejected for circumferential cracks in the spigot. In accordance with the resident engineer's memorandum of May 24, 1965, all pipes with circumferential cracks were required to be hydrostatically tested to determine if the crack extended through the shell. As the contract may not be construed as prohibiting all cracks in the pipe, this was clearly a misuse of the testing procedure. However, special hydros

were not required on pipes with circumferential cracks on the outside in spigot gasket groove if the crack was not visible on the inside of the pipe after December 14, 1965 (note 131, *supra*). The evidence does not establish that the pipes which passed the test contained defects sufficient to justify their rejection. The Board finds that 292 pipes (145 tested for circumferential cracks in the barrel and 147 tested for circumferential cracks in the spigot) passed the special hydrostatic test and were accepted.

The resident engineer's memorandum of May 24, 1965, required pipes with short longitudinal cracks which were repaired prior to May 13, 1965, to be hydrostatically tested irrespective of whether the repairs were major and required pipes with short longitudinal cracks (less than one-half the length of the pipe) to be hydrostatically tested prior to repair. These requirements were modified to the extent that pipes with not more than two longitudinal cracks other than in bell or spigot gasket areas which did not exceed two feet in length and which did not extend under pressure were acceptable with repair and without rehydro after September 1, 1965 (note 131, *supra*). The record does not indicate the number of pipes in this category. There appear to have been 245 pipes subjected to hydrostatic tests for longitudinal cracks of which 146, or approximately 59.6 percent, failed (Exh. 64). As we have found, 40 of these pipes having repairs to short longitudinal cracks

¹⁷⁶ Hydrostatic Test Study (note 162, *supra*). The Study distinguishes between pipes upon which special hydros were conducted for circumferential cracks and those tested for cracked or pulled spigots. However, a tabulation of pipes rejected in the May 15 inventory (Exh. 60), the Summary of Pipe Units Reclaimed (Exh. 146) and the Comparison of Rejected Pipe Remaining in the Yard on June 20, 1966 (Exh. 5Q), make no such distinction.

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had previously been accepted and were rejected during the May 15 inventory. At least 15 of these pipes passed the tests and were reaccepted. We find that 99 pipes, including 15 referred to above, tested for longitudinal cracks passed the test and were accepted.

The memorandum of May 24, 1965, required that all pipes having repairs to seams (such pipes were repairable prior to testing, provided cracks were not evident after removal of defective concrete) be hydrostatically tested irrespective of whether the repair could properly be considered major. There appear to have been a total of 66 pipes subjected to special hydrostatic tests because of bad seams, other than tests at a lower head than for which the pipes were manufactured, of which 15, or approximately 22.7 percent, failed (Hydrostatic Test Study). This figure does not include retests, if any, on pipes which initially failed the tests. Cen-Vi-Ro asserts that form joint leakage does not mean that the pipes were cracked and that under the Concrete Manual there was no basis for requiring hydrostatic tests on all such repaired pipe (Appendix to Claims on DC-6000, Exh. 5N, p. 8). Messrs. Peckworth and Davis characterized seam joint roughness as being generally or usually minor repair (Tr. 105; Deposition, p. 14).

Mr. Thomas testified without contradiction that Cen-Vi-Ro did not use gaskets on the forms to prevent mortar leakage as required by the specifications (Tr. 1353). He

stated that during the first six or eight months of operation while the forms were new the absence of gaskets did not appear to make much difference, but that as the forms became "beat up" through repeated use more grout leakage resulted at the seam and at the bell and spigot forming ring. It appears that grout leakage occurred on significant quantities of pipes, 10 to 15 percent, as late as April of 1966 (chronology appended to Production Quality Graph, Exh. 73). This evidence, which we accept as accurate, compels the finding that Cen-Vi-Ro continually failed to take known corrective action to reduce or eliminate form joint leakage. It follows that the Bureau could properly require hydrostatic tests on these pipes as a condition of their acceptance and that Cen-Vi-Ro has not established that these tests were excessive or improperly required.

There were 31 pipes subjected to special hydrostatic tests for rock pockets other than gyro areas of which eight failed the test (Exh. 64). These are pipes tested and not necessarily the number of tests. One pipe (72AB50 x 20, No. 15N, mfg. 3-9-65) indicated to have unconsolidated concrete is in the Final Inventory of Rejected Pipes (Exh. 152) even though it passed the test. We find that the balance of the pipes which passed the test were accepted.

The remaining category is 248 pipes subjected to special hydrostatic tests for miscellaneous reasons of which 54 or approximately

21.7 percent resulted in failure (Exh. 64). This figure does not include retests on pipes which initially failed the tests. It appears that approximately 15 of these pipes were tested for impact damage to or broken bells and spigots (three of which are indicated to have passed the test), and are included in the Final Inventory of Rejected Pipe (Exh. 152). It is probable, but far from certain, that many of the other tests in the miscellaneous category were for similar reasons. We have found that 233 pipes rejected for rocky bells in the May 15 inventory were subsequently accepted. However, hydrostatic tests on repaired rocky bells do not appear to have been generally required (Inspectors Daily Report, dated August 4, 1965). We have also found that 150 pipes rejected for fallouts in excess of one square foot during the May 15 inventory were subsequently accepted.

We agree with the resident engineer that a repair to a fallout of any consequence would be a major repair (note 56, *supra*). Consequently, hydrostatic tests for the purpose of testing the repaired area of fallouts were fully in accord with the Concrete Manual. However, it is the Government that is asserting that pipes subjected to special hydrostatic tests contained defects sufficient to justify their rejection or that the tests were for the purpose of testing repaired areas. We think that the Government at the very least had an obligation to identify the purpose of tests which

prima facie were not in accordance with the contract. Accordingly, we decline to assume that any number of pipes tested for miscellaneous reasons were for the purpose of testing the repaired area of fallouts or other major repairs. We have referred to several pipes upon which special hydros were conducted for the purpose of testing alleged improper vibration, spinning or cure (note 165, *supra*). We infer that many of the other special hydros listed under miscellaneous were for similar reasons. The test provided in the contract for proper cure of the pipes was compressive strength of the concrete and not hydrostatic tests. The evidence does not establish that all of the pipes subjected to special hydrostatic tests which passed the tests contained defects sufficient to justify their rejection. If the pipes passed the test, the Bureau concluded that the defects were minor and except for three pipes referred to above accepted the pipes without repairs (par. 72, Findings of Fact). We find that 191 of these pipes were accepted after passing the special hydrostatic test.

Mr. Franklin testified that a second source of hydrostatic tests not anticipated when the bid was prepared was a decrease in the lot-test period from one work week to three days (Tr. 344, 345). This decrease was effected on May 10, 1965 (Tr. 1534; Special Report, dated May 21, 1965, note 24, *supra*). Mr. Thomas stated that the reason for the decrease was the many failures on lot-tests and the great number of pipes

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being produced per shift. When asked whether the latter was a justifiable reason for reducing the lot-test period under the contract, he replied that his justification was instructions from the project engineer. The contract does not permit a decrease in the lot-test period for the reasons given, but does permit a decrease in the discretion of the contracting officer if there is, *inter alia*, a significant change "in the mix proportions." (Subparagraph 67.i. (1) of the specifications.) The record reflects that there were mix changes initiated by Cen-Vi-Ro on March 6 and 26, April 2, 6, 13, and 14, and May 3 and 26, 1965.¹⁷⁷ Based on the variances in sand, water, cement and aggregate content, the Board finds that mix changes on March 26, April 2, 13 and 14, 1965, were significant.

¹⁷⁷ Memorandum, dated March 6, 1965, Cen-Vi-Ro Correspondence; Inspectors' Daily Reports of dates cited. Cen-Vi-Ro appears to have begun using the following mixes as of March 8, 1965:

	1 cubic yard batch (pounds)	1.38 cubic yard batch (pounds)
Cement -----	610	842
Water -----	207	286
Sand -----	1, 073	1, 481
1-inch aggregate ----	1, 140	1, 573
¾-inch aggregate ----	1, 133	1, 564

(Memorandum, dated March 6, 1965, Cen-Vi-Ro Correspondence.)

Based on a weight of approximately 8.3 lbs. per gallon of water, it appears that approximately 25 gallons of water were used in the small batch and approximately 34.4 gallons in the large batch. Water in the large batch was reduced to approximately 21 gallons as of March 26, 1965. On that date ¾-inch aggregate in the large batch was reduced from

The lot-test period was restored to one work week or six days as to all pipes except 20-foot pipes and DC-6130 pipes of 100 and 125-foot head on July 12, 1965 (Inspectors Daily Report of date cited). While it appears that the Bureau agreed to increase the lot-test period where it was justified by good test results (memorandum of Bureau Meeting, dated July 9, 1965, Cen-Vi-Ro Correspondence), there is no specific evidence in the record that the lot-test period for 20-foot pipes was ever restored to six days. There were 419 lots of 20-foot pipes, but only 390 lot tests on such pipes (Hydrostatic Test Study). There is no explanation in the record for this discrepancy. We do find, however, that there were 377 lot tests on 345 lots of 16-foot pipes. From

1,590 to 960 lbs. and 1-inch aggregate was increased from 1,590 to 2,234 lbs. Quantities of ½-inch and 1-inch aggregate per batch were restored to equal proportions as of March 30, 1965 (Inspectors Daily Report, dated March 29, 1965). As of April 2, 1965, small batches consisted of 694 lbs. of cement, 1,435 lbs. of sand, 1,420 lbs. of ½-inch aggregate and 1,433 lbs. of 1-inch aggregate. On April 13, 1965, the materials for the small batch were changed to 564 lbs. of cement, approximately 23 gallons of water, 1,096 lbs. of sand, 1,388 lbs. of 1½-inch aggregate and 919 lbs. of ¾-inch aggregate (memo, dated April 13, 1965, Cen-Vi-Ro Correspondence). Materials for the large batch as of April 13, 1965, consisted of 694 lbs. of cement, 28.4 gallons of water, 1,348 lbs. of sand, 1,707 lbs. of 1½-inch aggregate and 1,130 lbs. of ¾-inch aggregate. On April 14, 1965, large batch materials were changed to 750 lbs. of cement, 1,375 lbs. of sand, 1,680 lbs. of 1½-inch aggregate and 1,120 lbs. of ¾-inch aggregate. These are exclusive of mix changes involving substantial increases in sand content, referred to as U.S.B.R. mixes 1 and 2, suggested by Mr. Borden at the time of his visit to the plant in April of 1965 (Inspectors Daily Report, dated April 22, 1965; Travel Report of R. C. Borden, dated May 18, 1965, note 23, *supra*).

units produced and the number of lots, we conclude that it is highly unlikely that the excess lot tests on 16-foot pipes can be explained by lot sizes in excess of 100 units.¹⁷⁸ The apparently excess lot tests on 16-foot pipes may be due to the reduction in the lot-test period. Of the the 390 lot tests on 20-foot pipes, 101 were conducted through May 15, 1965, resulting in an average lot size of approximately 37 based on production of 3,738 pipes (Exhs. 5R and 83).

For the period after May 15, 1965, 289 lot tests were conducted on 8,619 20-foot pipes for an average lot size of approximately 29.8. This decrease in the average lot size at a time when difficulties with the 20-foot spinner were being overcome and when the quality of the pipe was improving suggests that the lot-test period for 20-foot pipes was not restored to six days. However, the record is silent with respect to complaints by Cen-Vi-Ro for failure to restore the lot-test period to six days for 20-foot pipes. In view of the mix changes referred to above which we have determined were significant, the Board finds

¹⁷⁸ Hydrostatic Test Study (note 162, *supra*). There were a total of 30,133 pipes produced in 764 lots of which 12,354 were 20-foot pipes. Although 20-foot pipes represented approximately 41 percent of all pipes produced, 20-foot pipes accounted for 1,862 or in excess of 59 percent of total hydrostatic tests. There is no evidence to support the contracting officer's finding (par. 68, Findings of Fact) that numerous lots had slightly over 100 pipes. The record reveals only one instance of a complaint by the contractor that the Bureau required two lot tests on the same size and class of pipe (size and class not stated) for one period (Inspectors' Daily Report, dated June 29, 1965).

that the contracting officer had ample justification under the contract for reducing the lot-test period. In any event, we cannot say on this record that any additional tests attributable to reduction of the lot-test period were improper.

Cen-Vi-Ro complains that Bureau inspectors visually selected the most questionable pipes to be tested as representative of the lot instead of using random sampling techniques (Exh. 5M, p. C2; Notice of Appeal, p. 29). While the Government denies that the most questionable pipes were selected, it does not deny that selection of the lot-test pipe was not truly random until November of 1965 (Brief, pp. 94, 95). An Inspectors' Daily Report, dated August 30, 1965, states that a lot-test sample was chosen from 16-foot pipes with poorly finished spigots since the contractor's personnel could see nothing wrong with the pipe. This was confirmed by Mr. Franklin (Tr. 550, 551). The results of the test on this sample do not appear in the record. The Government also asserts that the contract provides that the contracting officer shall select the sample. We find that the contract is silent on the method of selecting the lot-test pipe and that the provision relied upon by the Government (Subparagraph 67.i. (1)) is applicable to check tests, *i.e.*, tests on two pipes from the lot after failure of the original lot-test sample.

We have previously referred to a discussion on December 30, 1964, wherein the contractor desired one of the apparent best pipes to be se-

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lected as the lot-test sample and was advised that in that event all that looked less than the best would be marked for special hydro. Although this conversation would not support an inference that the most questionable pipe was selected as the test sample, it clearly implies that other than the best was selected. Mr. Franklin testified that initially the lot-test sample was arbitrarily chosen by Bureau personnel and that subsequently a method of selection from cards was utilized (Tr. 548, 549, 553). He did not recall the date of the change. The Government asserts that the change to random sampling occurred on November 11, 1965 (Tr. 549; Brief, p. 94). Mr. Franklin admitted that if the blind selection method resulted in an obviously defective pipe being selected for the test, that pipe would be set aside and another pipe chosen (Tr. 553, 554). This obviously was a benefit to Cen-Vi-Ro. Other than the single instance, referred to above, the evidence does not support the proposition that the Bureau consistently selected the most questionable pipes as the lot-test sample.

As evidence that Cen-Vi-Ro furnished pipes of excellent quality and beyond the requirements of the contract, Cen-Vi-Ro introduced the results of a test of 30,238.67 linear feet of the installed line during the period March 24 through April 15, 1966 (App's Exh. A). The test indicates that water loss not including evaporation during this three-

week period declined from 14.71 gallons per mile per day upon the initial filling to .71 gallon per mile per day.¹⁷⁹ Mr. Peckworth characterized the results of the test as phenomenal as compared with the standard established by the American Waterworks Association for noncylinder concrete pressure pipe of 100 to 150 gallons per inch of internal diameter per mile per day (Tr. 113, 116, 117). It appears, however, that the test was static, i.e., the line was merely filled with water (Tr. 1728; Order for Changes No. 1), and Mr. Peckworth admitted that his conclusion would be different if he knew the line was only filled with water (Tr. 254). Cen-Vi-Ro asserts that the line in use was a gravity line, not a pumped line, and that the hydrostatic pressure during the test approached the service head of the line (Reply Brief, p. 7). The first assertion appears to be accurate since we find no reference to pumping plants in Specifications DC-6000. The second assertion is not supported by any evidence of record. There can, of course, be no doubt that the weight of the water plus differences in elevation would result in hydrostatic pressure on the pipes.

Mr. Rippon, who characterized the results of the test as "acceptable," testified that no line loss was anticipated in the planning of the

¹⁷⁹ Although not so stated on the results of the test, Mr. Franklin and Mr. Rippon described the test results in gallons per inch in diameter per mile (Tr. 460, 461, 1796).

aqueduct.¹⁸⁰ However, on cross-examination he stated that if the pipeline is allowed to soak for 21 to 30 days, the loss would drop to almost zero unless there were leaking joints or pipes. He admitted that the Bureau had provided for exfiltration rates of 50 gallons per inch of diameter on large aqueducts in other specifications and stated that he regarded any test results within specification limits as acceptable (Tr. 1797-1799). The instant contract did not contain any allowable exfiltration rates. Mr. Franklin and Mr. Chapple, the Bureau's engineer in charge of pipe laying for specifications DC-6130, characterized the results of the test as "good" (Tr. 425, 461). While the Government also belittles the results of the test upon the ground it represented a small percentage of the line (in excess of six percent) and was intended to be a test of pipe laying rather than of pipe quality, we conclude that the test is substantial evidence that the quality of the pipes installed in the line was not substandard.

Decision.

Hydrostatic tests performed on pipes other than lot or check tests were called "special hydros." Except to the extent that these tests were performed on pipes upon which major repairs were accom-

plished, upon occasional units of pipes having lesser repairs, and upon representative units of cracked but unshattered pipes, the tests were not required by the contract. Although Cen-Vi-Ro, in the early stages of production, joined in the practice of conducting special hydros in order to prove the competence of otherwise questionable pipes, it verbally protested the frequency of special hydros on several occasions. The Bureau was clearly on notice as early as September 1964 that Cen-Vi-Ro considered that too many pipes were being marked for special hydros. Cen-Vi-Ro's letter of June 10, 1965, placed the Bureau on notice that a claim for all alleged changes flowing from the May 13 letter was being asserted. We hold that Cen-Vi-Ro's failure to protest in writing the frequency of special hydros does not preclude the assertion of the instant claim for excessive and unreasonable special hydros, *i.e.*, those conducted on pipes which could not properly be rejected.

There were a total of 1,801 special hydros of which 45.6 percent resulted in failure. The Government contends this high failure rate is proof of substandard pipe manufactured by Cen-Vi-Ro and vindication of its inspector's judgment of pipes which were questionable. Cen-Vi-Ro asserts that many of the pipes rejected would have healed within seven days and could not properly be regarded as failures, that many pipes would have passed had repairs been permitted prior to test-

¹⁸⁰ Tr. 1730. This testimony is simply incredible if the exfiltration rates established by the American Waterworks Association referred to by Mr. Peckworth, and with which Mr. Rippon was also clearly familiar (Tr. 1795, 1796), are regarded as normal for concrete pressure pipe.

ing, that the tests should have been conducted at service head in accordance with the Concrete Manual rather than at 120 percent thereof for 20 minutes and that the Bureau improperly classified sweating pipes as leakage. It is, of course, well settled that the burden of proving that tests were improperly conducted and yielded erroneous results is on the appellant.¹⁸¹ We hold that a pipe which leaked on the test stand was properly regarded as a failure until Cen-Vi-Ro demonstrated that the pipe had healed. Since Cen-Vi-Ro recognized in writing the practice of conducting special hydros at 120 percent of service head for 20 minutes and failed to object thereto at the time, we hold that Cen-Vi-Ro is now precluded from objecting to the manner in which special hydros were conducted.¹⁸²

We have found merit in Cen-Vi-Ro's contention that many pipes having longitudinal or circumferential cracks or unconsolidated areas which failed the hydrostatic test would have passed the test had repairs in accordance with the Concrete Manual been permitted prior

to testing. The Bureau's reason for refusing to permit such repairs was that a superficial repair might enable the pipes to pass the hydrostatic test and yet conceal a structural weakness. While the Bureau could properly refuse to accept a defective pipe until it was satisfactorily repaired, it could not properly refuse to permit repairs allowed by the Concrete Manual for the reason stated. The Bureau concluded that defects on all but a very few of the pipes which passed the test were minor and the pipes were accepted without repair. In the absence of other justification for the Bureau's actions, *i.e.*, failure to take known corrective action or that the tests were conducted for the purpose of testing major repairs or on occasional pipes having lesser repairs, Cen-Vi-Ro has established *prima facie* that a change to the contract was effected.

The evidence does not establish that Cen-Vi-Ro continually failed to take known corrective action to eliminate or reduce longitudinal and circumferential cracks, and unconsolidated concrete in barrels and spigots. The record reflects that 424 pipes were subjected to special hydros for circumferential cracks (153 in the barrel and 271 in the spigot) of which 175 failed. Fifty-one of the failures were pipes with circumferential cracks in the barrel and all but eight of these were ultimately accepted. Since repairs to circumferential cracks were not allowed after May 13, 1965, we conclude that these pipes healed sufficiently to pass

¹⁸¹ See, among others, *Chester Barrett, d/b/a The American Tank Company*, IBCA-429-3-64 (February 28, 1966), 66-1 BCA par. 5406, affirmed on reconsideration (April 7, 1966), 66-1 BCA par. 5503; *Continental Chemical Corp.*, GSBCEA No. 2735 (August 14, 1969), 69-2 BCA par. 7839 and *Universal Steel Strapping Co.*, ASBECA No. 13686 (July 10, 1969), 69-2 BCA par. 7799.

¹⁸² See *S. S. Silberblatt, Inc., v. United States*, note 77, *supra* (construction parties placed on contractual provision before controversy arose should not be disturbed); *Precision Products, Inc.*, ASBECA No. 14284 (August 19, 1970), 70-2 BCA par. 8447 (contractor failure to object to inspection standards at time they were chosen).

when retested. There were 245 special hydrostatic tests for longitudinal cracks of which 146 failed. A minimum of 15 of the passing tests were on pipes with short longitudinal cracks which had been repaired and accepted prior to May 13, 1965. There were 31 special hydrostatic tests for unconsolidated concrete other than gyro areas of which eight failed the tests. One pipe with unconsolidated concrete is in the Final Inventory of Rejected Pipe even though it passed the test. We have concluded that Cen-Vi-Ro should have been permitted to repair this pipe. As to the balance of the pipes which passed the test, the Bureau concluded that the defects were minor and accepted the pipes without repair. Under such circumstances, we conclude that the costs of the tests may properly follow the results.¹⁸³ We find that Cen-Vi-Ro is entitled to be compensated for the costs of 414 special hydrostatic tests.

As to the 248 pipes which were subjected to special hydrostatic tests for miscellaneous reasons of

which 54 failed, it appears that at least 15 of these tests were for broken bells or impact damage to bells and spigots. Two pipes with impact damage to or broken spigots were rejected notwithstanding they passed the test. We have found that Cen-Vi-Ro has not established that the rejection of these pipes was improper. We conclude that the costs of the tests may follow the results and that Cen-Vi-Ro is entitled to be compensated for conducting an additional 192 special hydrostatic tests.

We have found that Cen-Vi-Ro is chargeable with a continuing failure to take known corrective action to reduce or eliminate grout leakage at form seams and thus is not entitled to compensation for conducting hydrostatic tests on such pipes as a condition of their acceptance.

During the May 15 inventory 94 previously accepted pipes which exhibited evidence of gyro area concrete were rejected. These pipes were subjected to hydrostatic tests and 93 were reaccepted. The evidence does not establish that these pipes were defective. Although we have found that Cen-Vi-Ro continually failed to take known corrective action to reduce or eliminate gyro area concrete prior to July 31, 1965, such finding does not justify special hydrostatic tests on conforming pipes. We hold that tests on 93 of these pipes could not reasonably be required at Cen-Vi-Ro's expense (note 183, *supra*). There is no basis for compensating Cen-Vi-

¹⁸³ While not literally applicable, we think this result is in conformance with paragraph (e) of Clause 10 entitled "Inspection and Acceptance" of the General Provisions which provides that at any time before acceptance of the entire work the contractor shall, on request, promptly furnish all necessary facilities, labor, and material to make an examination of work already completed, by removing or tearing out the same. This paragraph further provides for an equitable adjustment of the contract price for the additional services and reconstruction costs if the work is found to meet the requirements of the contract. *Cf. Polan Industries, Inc.*, ASBCA Nos. 4104, 4105, 4106 and 4107 (October 28, 1958); 58-2 BCA par. 1982 at \$190. *See also Wilkins Company, Inc.*, FAA CAP No. 66-13 (November 22, 1965), 65-2 BCA par. 5242 (contractor's obligation under Inspection and Acceptance clause limited to reasonable tests).

Ro for the balance of special hydrostatic tests on pipes evidencing gyro area concrete.

The Government asserts that to compensate Cen-Vi-Ro for special hydrostatic tests now deemed excessive is to allow it the benefits of its bargain, *i.e.*, the acceptance of otherwise doubtful pipes, while at the same time relieving it of the burdens of that bargain. This contention would have merit if the evidence established that the pipes as to which we have found that Cen-Vi-Ro was entitled to be compensated could properly be rejected by the Bureau. The evidence does not establish that this is so.

The record establishes that prior to November 1965 the method of selecting the lot-test sample was not truly random. However, with a single exception, the record does not support Cen-Vi-Ro's assertion that the most questionable pipe was selected for this purpose. The result of this test is not shown. We hold that Cen-Vi-Ro has not shown that it was harmed by the Bureau's failure to use random sampling techniques prior to November of 1965. We have found reasonable the contracting officer's action in reducing the lot-test period and the record does not establish that excessive lot tests were required.

The appeal as to testing criteria is sustained as to 699 special hydrostatic tests and is otherwise denied. The amount of the equitable adjustment will be determined in a subsequent portion of this opinion.

Changing Criteria for Pipe Acceptance

This aspect of the claim is principally concerned with pipe repair in accordance with the Concrete Manual and has been substantially treated under headings of the various pipe defects. We will deal here with Cen-Vi-Ro's assertion that final acceptance of pipe was based on more stringent specifications versus the Government's position that such changes in pipe acceptance criteria that did occur resulted principally from Bureau waivers or relaxations of specification requirements. We will also consider Cen-Vi-Ro's claim for compensation for acceptable but surplus pipes remaining in the yard after the completion of pipe production.

The contracting officer specifically found that pipe acceptance criteria did, in fact, change. However, he found that the Bureau initially accepted pipes which did not conform to the specifications and denied that the standards for pipe acceptance were at any time higher than those established by the specifications. He also determined that changes in criteria for pipe acceptance were made to accomplish a reasonable objective, that is to obtain uniform production of pipes meeting the requirements of the specifications; resulted in the acceptance of pipes not meeting specification standards and thus was a benefit to the contractor; resulted from production of pipes with latent defects or resulted from Bureau re-

laxations or waivers of specification requirements.

We have previously referred to Mr. Rippon's testimony that the Bureau decided to limit repair of concrete pipe and that this policy was embodied in the May 13 letter. If the Government's theory that the number of repairs determines pipe quality is correct, there can be no doubt that limiting repairs resulted in an increase in the quality of the pipe. The record reflects and we have found that the Bureau restricted repairs to pipes, *e.g.*, fallouts, unconsolidated areas including gyro area concrete, rocky bells, impact damaged bells, and longitudinal and circumferential cracks which were normally repairable in accordance with the Concrete Manual. Although these restrictions were subsequently relaxed in certain respects such as the criteria for repair of rocky bells and fallouts, restrictions on repairs to gyro areas, impact damaged bells, and longitudinal and circumferential cracks were not relaxed to any significant extent. As to gyro areas, rocky bells and fallouts, we have found that Cen-Vi-Ro is chargeable with a continuing failure to take known corrective action and that restrictions on repair of these defects were largely justified.

The opening sentence of the letter of May 13, 1965, from the project engineer referred to the importance of the Canadian River Project Aqueduct and the exacting perform-

ance required in delivery of municipal water on a continuing and uninterrupted basis which made it imperative that only first quality pipe be used in the line. Similar statements appear elsewhere in the record. For example, at a meeting on May 20, 1965, Cen-Vi-Ro representatives were advised that the fundamental purpose of the May 13 letter was to assure that only quality pipe be installed in the line and that the Bureau could not tolerate use of inferior pipe which might continue to cause trouble and maintenance expense after the line was placed in service (memorandum dated May 21, 1965, Exh. 21). In the meeting of July 24, 1965, Mr. Rippon is quoted as saying that the Canadian River Municipal Water Authority was to be furnished with an aqueduct which would be virtually maintenance free (p. 2, Notes on Meeting, note 46, *supra*). In a letter of December 3, 1965, the project engineer stated that since the aqueduct system will carry water to eight cities and cannot be taken out of service for long periods, it is most important that high quality concrete pipe be used in the line (Exh. 5N, p. 35). It is clear from the contract drawings that the purpose of the aqueduct was to supply water to municipalities. However, we find nothing in the contract or specifications which indicates that the line is to be maintenance free. The record is inconclusive on the question of whether a concrete pipeline is nor-

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mally or usually maintenance free.¹⁸⁴

We have previously referred to 86 acceptable but surplus pipes in the yard at Cen-Vi-Ro's plant in December of 1966 (note 87, *supra*). In a letter of May 25, 1966 (Exh. 5N, p. 28), Cen-Vi-Ro requested a determination as to whether the Bureau would accept responsibility for pipes which were acceptable or could be made so, but for which replacements had been manufactured to meet the laying schedule. The project engineer denied liability upon the ground that as of May 25, 1966, the only pipes needed to complete the contracts were for heads of 50-foot and above and that the pipes in question were 25-foot heads which had been downgraded upon failure to pass the hydrostatic test at the design head (letter of May 31, 1966, Exh. 5N, pp. 30, 31). Twenty of the surplus but acceptable pipes are for 25-foot heads (Exh. 37). Although the evidence does not establish that these pipes had been downgraded, Cen-Vi-Ro has not disputed the assertion they were downgraded. Forty of these 86 pipes were manufactured prior to May 15, 1965, and it is possible that these were pipes improperly re-

jected in the May 15 inventory. However, Mr. Herrera testified to instances of pipes being lost in inventory (Tr. 781, 782) and there is no evidence of when the replacement pipes were manufactured or of the need for particular sizes and classes of pipes in terms of the laying schedule. Accordingly, we cannot, on this record, find that the decision to manufacture replacements for these pipes was reasonable.

We find that with the exception of small diameter pipes the evidence does not support the contracting officer's finding that the Bureau in the early stages of contract performance accepted pipes not complying with contract requirements. We recognize Mr. Lincoln's testimony that the Bureau in the early period of contract performance may have accepted a few pipes with extensive repairs that proved out on hydrostatic tests (Tr. 1894). Since the contract contemplated that repairs in accordance with the Concrete Manual were permissible, this testimony does not establish that any accepted pipes did not comply with the specifications. Accordingly, we reject this defense to the claim pipe acceptance criteria were changed.

It is true that the Bureau accepted in excess of 1,000 pipes which we have found were properly classified as small diameter provided pipes of larger diameter were substituted in the line to compensate for head loss (letters of October 16 and 30, and November 23, 1964, Exhs. 5B, 5C and 5D). After the

¹⁸⁴ Mr. Peckworth testified that concrete pipelines are expected to last 100 years (Tr. 284). He stated that he knew of some, presumably concrete, municipal pipelines that had been in service for 25 or 30 years that had never been touched for repairs (Tr. 249, 250). He admitted, however, that there were many which had been frequently broken for repairs. The Government concedes that it is unrealistic to expect that a reinforced concrete pipeline would never have to be shut down for repair (Second Statement of Position, p. 24).

relaxation of the criteria for determination of small diameter pipe, approximately 158 additional small diameter pipes were accepted without the necessity of substitution. These pipes were accepted because small diameter pipes were not being produced in significant quantities and were not a threat to the properties of the line (Tr. 1907).

The Bureau also permitted the repair and accepted substantial quantities of pipes with cracking or flaking interiors even though there is no provision of the Manual expressly permitting such repairs. We note that the Bureau's primary concern with pipes having flaking interiors was not with the integrity of the pipe, but with the effect increased roughness would have on flow (Tr. 1750). The Bureau permitted the repair of and accepted 233 pipes with rocky bells and 150 pipes with fallouts which were rejected during the May 15 inventory even though Cen-Vi-Ro is chargeable with a continuing failure to take known corrective action to reduce or eliminate these defects prior to May 15, 1965, and thus the Bureau was not obligated to accept these pipes.

The contracting officer found that four pipes with two or less core holes were accepted after repair and hydrostatic test. We have been presented no basis for disturbing this finding. The Concrete Manual, as Cen-Vi-Ro admits, does not provide for repair of core holes.

In the area of hydrostatic testing, the Bureau removed the speci-

fication requirement that pipes exhibiting minor dripping remain under the prescribed test pressure for periods up to seven days in order to determine if the pipes would heal and authorized the acceptance of pipes which ceased to drip when retested within seven days. It will be recalled that the Chief Engineer's letter of January 20, 1965, described the requirement of the original specification that the pipes remain under test pressure as unintended and unnecessary. It is not clear from the record when this authorization was actually utilized. The time limit on retesting dripping pipe was not enforced as to reclaim program pipes (memorandum of March 31, 1966, note 29, *supra*). It would appear that the Bureau ran little risk in this regard since the record reflects that pipes stored in the yard for extended periods would be more likely to fail the test (Tr. 97, 98). This would seem to be particularly true if the pipes were not soaked and it will be recalled that the soak period was waived at Cen-Vi-Ro's option.

There is no evidence in the record of any other waivers of specification requirements of any consequence.

The contracting officer made no findings as to sums due the Government for savings resulting from the specification waivers or relaxations referred to above. Department counsel stated that the cost of Government "accommodations" to Cen-Vi-Ro as well as increased costs of Government inspection would be

presented in due course (Second Statement of Position, p. 50). However, no such evidence was offered at the hearing.

Decision

The Government's admitted purpose in the letter of May 13, 1965, and instructions and directives issued to inspection personnel during the period April 30, 1965, to and inclusive of May 24, 1965, was to limit repairs and improve the quality of the pipes. We have found that the Concrete Manual was applicable and that the Bureau restricted repairs to pipe defects which were normally repairable under the Manual, *e.g.*, fallouts, unconsolidated areas (rock pockets) and longitudinal and circumferential cracks. These restrictions were significantly relaxed only as to fallouts and rocky bells. Cen-Vi-Ro is chargeable with a continuing failure to take known corrective action to reduce or eliminate rocky bells and fallouts prior to May 15, 1965, and gyro area concrete prior to July 31, 1965. Accordingly, restrictions on repairs to these defects prior to those dates were not contrary to the Concrete Manual.

We have found that the Bureau required hydrostatic tests beyond the requirements of the contract. Although Cen-Vi-Ro joined in and acquiesced in the practice of conducting special hydrostatic tests on questionable pipes in the early stages of production, it verbally

protested the number of special hydrostatic tests on several occasions.

There were 86 acceptable but surplus pipes in the yard after pipe production was completed of which 40 were manufactured prior to May 15, 1965. The evidence does not establish when the replacements for these pipes were manufactured or the need for such pipes in terms of the laying schedule. There is evidence that pipes were lost in inventory. Cen-Vi-Ro has not disputed the assertion that some of these pipes were surplus because they had failed hydrostatic tests at the design head. We conclude that Cen-Vi-Ro has not shown that it is entitled to be compensated for the surplus pipes.

With the exception of some small diameter pipes, the evidence does not support the Government's assertion that it accepted nonspecification pipes prior to May 13, 1965. Accordingly, there appears to be merit in Cen-Vi-Ro's contention that acceptance after May 13, 1965, was based on more stringent specifications. However, Cen-Vi-Ro has not established that any particular pipes or tests beyond those as to which we have previously sustained the appeal were improper and we hold that Cen-Vi-Ro has not shown that it is entitled to any additional compensation.¹⁸⁵

¹⁸⁵ It is well settled that a claim for an equitable adjustment, irrespective of merit, must be denied in the absence of proof of damage. *Steenberg Construction Company* (note 159, *supra*) at 44,044; *Fulcrum Corporation of New Jersey*, IBCA-745-11-68 (June 11, 1970), 70-1 BCA par. 8328.

We find that the Government has had ample time to assert and establish any claims for alleged savings due to waivers or relaxations of the specifications but that it has failed to do so.

The appeal as to changing criteria for pipe acceptance is denied.

Equitable Adjustment

While initially denying that its claim was based on the total cost approach (Notice of Appeal, p. 34), Cen-Vi-Ro now concedes that total cost was used as a starting point (Tr. 974; Reply Brief, p. 10). Cen-Vi-Ro asserts that this method of proving an equitable adjustment or damages has been sanctioned by the Court of Claims.¹⁸⁶

Cen-Vi-Ro has computed its actual out-of-pocket loss on both contracts as \$3,418,504 (letter of August 14, 1967, Exh. 5[O]; Brief p. 48). Cen-Vi-Ro computes the total cost overrun as \$5,032,462 which includes loss of estimated profit of \$1,613,958. Interest on money borrowed to finance the alleged extra work is also claimed. Cen-Vi-Ro concedes that plant construction costs above the estimates (\$427,035 for the north plant and \$394,897 for the south plant), overruns in pipe laying costs in addition to the \$100,000 payment to R. H. Fulton in the amount of \$211,215, and 50 percent of the final inventory of rejected pipe in the amount of \$400,000 may be for the account of the contractor

(Brief, p. 48). Subtracting this total (\$1,433,147) from the overrun, including loss of profit, leaves a total of \$3,599,315.

The above amount exceeds the sums excepted from the releases and Cen-Vi-Ro does not seriously contend that it is entitled to such a recovery. Although Cen-Vi-Ro asserts that it has established with reasonable precision the costs arising from certain of the Bureau's acts, it is clear that the claim is substantially based on the total cost approach or variations thereof. The guidelines for use of the total cost approach are well settled in that there must be proof: "(1) the nature of the particular losses make it impossible or highly impracticable to determine them with a reasonable degree of accuracy; (2) the plaintiff's bid or estimate was realistic; (3) its actual costs were reasonable; and (4) it [appellant] was not responsible for the added expenses."¹⁸⁷ Since we find that the above conditions for use of the total cost approach have not been established, we hold that total cost is not an appropriate means of computing an equitable adjustment in this instance.

With regard to (1) above, we have recently had occasion to emphasize that the total cost approach may be used where it represents the only feasible method of computing the amount due but that justification for its use had not been established where the additional costs

¹⁸⁶ Citing, among others, *Oliver-Finnie Co. v. United States*, 150 Ct. Cl. 189 (1960), and *J. D. Hedin Construction Co. v. United States*, 171 Ct. Cl. 70 (1965).

¹⁸⁷ *WRB Corporation v. United States*, 183 Ct. Cl. 409-628 (1968).

can fairly be categorized.¹⁸⁸ Although appellant's claim presentation leaves much to be desired, as we find *infra*, certain of appellant's costs have been established with sufficient certainty as to enable, in our judgment, a fair calculation of the amount due.

Appellant's bid totaled \$12,464,227 as compared to the next low bid of \$13,363,934 and the engineer's estimate of \$14,540,860 (Abstract of Bids, DC-6000, Exh. 143). Therefore, Cen-Vi-Ro's bid price was approximately 93.3 percent of the next low bid. It appears that the principal portion of the \$899,707 difference between Cen-Vi-Ro and the next low bid is attributable to laying and furnishing pipe.¹⁸⁹ The engineer's estimate for laying and furnishing pipe was \$12,194,948.50. Mr. Franklin testified that Cen-Vi-Ro's bid prices for pipe were approximately \$21 a ton on DC-6000 and approximately \$30 on DC-6130 (Tr. 337). Mr. Peterson confirmed this testimony (Tr. 971). Mr. Crane

testified that he was told on several occasions by Mr. Hubbard that the price should have been \$30 a ton as compared to the actual price of about \$21.50.¹⁹⁰ Although Mr. Hubbard denied making any such statement (Tr. 1109), we note that Mr. Peterson calculated the overrun, exclusive of claim payments to subcontractors, at \$10 to \$12 a ton (Tr. 972). Accordingly, we accept Mr. Crane's testimony with reference to Mr. Hubbard's admissions of a realistic bid price. However, we need not hinge our decision on resolution of this conflicting testimony since we have previously referred to Mr. Hubbard's admission at the meeting of October 28, 1964, that Cen-Vi-Ro had overestimated the capabilities of the 20-foot spinner and have found that Cen-Vi-Ro's optimism as to the anticipated number of hydrostatic tests was not justified. As we find *infra* Cen-Vi-Ro was also over optimistic as to the one percent anticipated rate for final rejects. We note the statement attributed to Mr. Crane at the meeting of October 30, 1964 (Exh. 9), that although prices were favorable to the Government, the Bureau considered there was a reasonable profit in the contract prices for the prime contractors and principal subcontractors on each job. Although the cited statement is some evidence to the contrary, we conclude Cen-Vi-Ro's bid prices for furnishing and laying concrete pipe were too low. The Board finds that

¹⁸⁸ *Steenberg Construction Company* (note 159, *supra*), at 44,041.

¹⁸⁹ Appellant's counsel sought to explain some of the difference by referring to the conviction of certain pipe manufacturers in California for collusion in the sale of concrete pipe and asserting that Cen-Vi-Ro submitted a "sleeper" bid (Tr. 2053-2055). The history of the convictions referred to appears in *Maricopa County v. American Pipe and Construction Co., et al.*, 303 F. Supp. 77 (D.C. Arizona, 1969), *aff'd*, 431 F.2d 1145 (9th Cir., 1970). For other related civil litigation see *State of Washington, et al. v. American Pipe and Construction Co., et al.*, 274 F. Supp. 961 (D.C. S.D. Calif., 1967), and the same case at 280 F. Supp. 802 (1968). Since counsel's explanation involved an assumption of criminal conduct on the part of other bidders, and it did not appear that any of the convicted firms were bidders, the hearing member ruled that it was improper.

¹⁹⁰ Tr. 1981, 1982. Government counsel referred to the average price for both contracts of \$23.50 per ton (Tr. 1109, 1110).

this condition precedent to the use of total cost has not been established.

We consider that condition (3), the reasonableness of the actual costs, and (4), that the contractor is not responsible for the added expenses, to be intertwined and will consider them together. In considering actual costs, we have held that no presumption of reasonableness is applicable.¹⁹¹ The contractor's experience on other jobs of similar magnitude is for consideration.¹⁹² As noted previously, Cen-Vi-Ro of Texas, Inc., was formed expressly for the purpose of bidding on the Canadian River Project (note 3, *supra*). While it appears that other affiliated companies and licensees have undertaken substantial projects involving the supply of concrete pipe,¹⁹³ Mr. Peterson denied that appellant had ever done so (Tr. 1016).

Also bearing on the question of the reasonableness of appellant's actual costs is its responsibility for costs in addition to its estimates. There can be no doubt that Cen-Vi-Ro is responsible for a substantial portion of such costs. We have previously alluded to Cen-Vi-Ro's cage difficulties. Mr. Franklin admitted that some of these difficulties were due to the installation of a cage ma-

chine which was not suitable.¹⁹⁴ There appear to have been about 280 improperly fabricated cages which were rejected in the first two months of production (Inspectors Daily Report, dated August 6, 1964). There were also delays attributable to form shortages and problems with the 20-foot spinner which as we have seen, had not previously been used to manufacture reinforced concrete pipe. There is evidence of machinery breakdowns some of which were attributed to improper maintenance and delays due to inclement weather.¹⁹⁵ There are repeated indications that Cen-Vi-Ro's difficulties, at least in part, were caused by inexperienced and unskilled labor. Cen-Vi-Ro admits that on or about February of 1965, a high percentage of defective pipes was produced, the costs of which are assertedly not included in the claim.¹⁹⁶ We conclude that an undetermined amount of Cen-Vi-Ro's costs are attributable

¹⁹⁴ Tr. 557. This was a spindle or bobbin-type machine which was replaced by a mandrel-type machine (Tr. 1341-1345).

¹⁹⁵ See, among others, Inspectors Daily Reports dated, July 1, 3, 8, 20 and 29; August 3, 5, 12, 24, 27 and 31; September 1, 17, 19 and 23; October 19, 20 and 27; November 9, December 7, 9, and 16, 1964; January 7, 8, 25, and 28; February 9 and 12; March 9, 16, 18, 20, 22, 23, 24, 26 and 27; April 2, 3, 13, 16, 17, 22, 24 and 29; May 11, 12, 13, 17, 20, 22, 26 and 29; June 1, 3, 4, 9 and 23; July 8, 9, and 10; August 5, 6, 19 and 24; September 1 and November 29, 1965. See also letter of January 5, 1965, memoranda dated February 8 and 23, March 1, 3, 19 and 29, April 16 and May 1, 1965; letters dated May 28, June 4 and 25, 1965; Murray memorandum, dated July 8, and letter of July 12, 1965 (Cen-Vi-Ro Correspondence).

¹⁹⁶ Exhibit 5L, p. 4. Cen-Vi-Ro asserts that this statement is applicable only to the specification changes effected by letter of May 13, 1965 (Reply Brief, p. 18).

¹⁹¹ *Steenberg Construction Company* (note 159, *supra*) at 44,041.

¹⁹² *J. D. Hedin Construction Company* (note 186, *supra*) at 87.

¹⁹³ Cen-Vi-Ro Pipe Corporation of Shafter, California, has undertaken to supply substantial quantities of pipe to the Bureau and the California Department of Water Resources. Mr. Peterson referred to other substantial projects including production of concrete products (Tr. 1051, 1052).

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to improper maintenance and to that extent have not been shown to be reasonable. We also conclude that a portion of Cen-Vi-Ro's costs above its estimated cost is due to underbidding and that a further portion of such cost is due to factors such as inexperienced labor, start-up difficulties inherent in commencing production in a new plant and cage and pipe manufacturing problems which are clearly Cen-Vi-Ro's responsibility. We conclude that justification for the total cost approach in computing an equitable adjustment has not been established.

Cen-Vi-Ro's claim is summarized as follows: (Exh. 5M, p. F1)

1. Cost for Extra Man Hours on Testing of Repairs-----	\$602,940
2. Cost to Manufacture Excess Rejects -----	395,528
3. Cost of Materials in Excessive Rejects-----	381,975
4. Cost of Loss of Efficiency for 10 Months -----	396,000
Subtotal -----	\$1,776,443
5. Overhead and Profit at 15 percent -----	271,111
6. Payment to Pipe Laying Subcontractor for Delays in Shipping -----	100,000
7. Cost to Dispose of Reject Pipe -----	120,314*
Total as amended -----	\$2,147,554

*Withdrawn at the hearing, note 1, *supra*.¹⁹⁷

¹⁹⁷ The Government has made a general objection to appellant's claim presentation upon the ground costs are shown in summary form and appellant's books and records were not made available at the hearing (Appendix to Brief, pp. 20, 21). While we recognize that in instances where the Government has elected not to conduct an audit the contractor's books and records are ordinarily produced or other-

Extra Man Hours for Testing and Repairs

In computing this claim, Cen-Vi-Ro determined average man-hours per ton of pipe produced for the period March 1966 through the completion of pipe production in June of 1966 (Tr. 981, 982; Exh. 5M, p. F3). This figure was computed as 1.42 man-hours per ton of pipe. However, an error was made in computing the actual man-hours per ton for the week ending March 13, 1966, and Cen-Vi-Ro now admits that the average for the above period should be 1.47 man-hours per ton (p. 5, Answers to Interrogatories, Exh. 129). This figure was then subtracted from the actual man-hours per ton for each week during the period May 2, 1965, to and including February 27, 1966, resulting in a total of 162,781 allegedly excess man-hours (Exh. 5M, p. F4). However, because of the mistake pre-

wise available at the hearing (see, e.g., *E. W. Sorrells, Inc.*, ASBCA Nos. 13348, 14537, 14573 (October 12, 1970), 70-2 BCA par. 8515), we overrule the Government's objection in this instance. First, Cen-Vi-Ro repeatedly offered its records as available for audit (Answers to Further Interrogatories and Request for Documents, Exh. 124; Letter of April 15, 1970, Exh. 127). Second, the summaries in question are in the record as part of the appeal filed and we think the sources of the costs shown on the summaries were sufficiently demonstrated by testimony at the hearing and answers to interrogatories. Lastly, we think that any such objection should have been made at the hearing and is simply not timely when raised for the first time on a post-hearing brief. We note that the Government objected to the introduction of a certain summary (proposed Exhibit G) at the hearing upon the ground that the records from which the summary was compiled were not available (Tr. 1022), that the objection was sustained, and that the proffer of the summary was later withdrawn (Tr. 1026).

viously mentioned the correct total is 153,458 (Tr. 1037, 1038; p. 5, Exh. 129). To this total was applied labor costs of \$2.024 per man-hour, computed by dividing total productive man-hours of 1,097,667 into the total payroll including payroll taxes and insurance of \$2,221,728.¹⁹⁸ Next Cen-Vi-Ro applied three so-called "adders" to the allegedly excess man-hours: \$.57 per man-hour representing 25 percent of equipment and plant support costs which were determined to be \$2.29 per man-hour, small tools and supplies at \$.24 per man-hour and indirect job costs of \$.87 per man-hour, resulting in a total as corrected of \$568,408 (Tr. 1038; p. 5, Exh. 129).

Equipment and plant support costs of \$2.29 per man-hour were computed by dividing the total for such costs, \$2,508,480, by total man-hours of 1,097,667 (Exh. 5M, p. F8). Original investment in the north plant is stated to be \$1,485,819 and in the south plant as \$1,040,627.¹⁹⁹ Depreciation based on a 15-year plant life for a normal 40- to 50-hour week utilizing the double declining balance method and adding 50 percent for a 2-shift operation was computed at \$540,408 for the north plant and \$266,189 for the

south plant. Included in plant equipment and support costs is an item representing interest on investment at five percent for two years on the north plant (\$148,582) and 11¼ years on the south plant (\$65,039) for a total of \$213,621. Mr. Karl Peterson, who principally prepared the claims, testified that costs stated were net job costs and did not include financing costs (Tr. 1027). We conclude that this item is not properly a cost. Other items under this heading include school and county taxes in the amount of \$18,000, insurance [for equipment, Tr. 1060] of \$22,199, spare parts including freight of \$942,081 and electricity, gas, supplies and outside rentals for equipment operation totaling \$505,982. Deducting the item for interest on investment, which we have determined is not a cost, the total for equipment and plant support costs is \$2,294,859 which reduces man-hour costs in this category from \$2.29 to \$2.09. At 25 percent the adder for this factor is reduced from \$.57 to \$.52 per man-hour. Mr. Peterson conceded that the 25 percent was an arbitrary figure guided by experience in measuring support required for plant personnel (Tr. 1051).

The next adder was \$.24 per man-hour for small tools and supplies (Exh. 5M, p. F9). Costs for small tools and supplies are totaled as \$263,167 representing approximately 11.8 percent of payroll costs. Mr. Peterson testified that it was not appropriate to use a 25 percent

¹⁹⁸ Tr. 1038, 1039, 1052-1054; Exh. 5M, pp. F5 and F7. The Government calculated total man-hours at 1,005,425 based on submitted payrolls (Man-hour per Ton Study, Exh. 150).

¹⁹⁹ Cen-Vi-Ro asserts that actual, audited plant construction costs are \$1,563,007 for the north plant and \$1,086,638 for the south plant (Brief, p. 48). These figures are allegedly \$427,035 and \$394,897, respectively, above the original estimates.

factor in this instance since there was a direct relationship between such costs and labor (Tr. 1052). He denied that this factor was high by industry standards (Tr. 1057).

The final adder is indirect job costs totaling \$952,235 or \$.87 per man-hour (Exh. 5M, p. F10). Cen-Vi-Ro asserts that all supervisory costs and expenses incurred to support the operation were compared with all the recorded man-hours of labor to arrive at a unit cost (Exh. 5M, p. E2). Mr. Peterson testified that this account was charged with costs which did not appear to belong in other accounts and included items such as fidelity insurance, insurance on vehicles and the office, rent, clerical help, postage and certain supervisory salaries not otherwise included in direct labor costs (Tr. 1058-1060). While he denied that the job was charged directly with executive salaries, he was rather vague as to the supervisory salaries included in indirect job costs and stated that they "might be safety people." (Tr. 1059.) We think that the items comprising these costs could and should have been set forth with more precision.²⁰⁰ The contract provides that extra work and material are to be paid for at the actual necessary cost as determined by the contracting officer, plus an allowance, not to exceed 15 percent, for

superintendence, general expense and profit.²⁰¹

Mr. Peterson testified as to the reason for using the last 3½ months of production as representative. He stated that it was simply an assessment of what Cen-Vi-Ro considered was the capacity of the plant when manufacturing standards had reached a point where they were generally understood (Tr. 986, 1040, 1041). It is clear that this aspect of the claim has been computed on the basis of man-hours per ton of pipe produced during a period when the plant was operating at or close to maximum efficiency as compared to a prior and less efficient period of production. This, in appropriate circumstances, could be a reasonable method of computing loss of efficiency. However, what is missing is persuasive evidence that the excess man-hours are in fact attributable to repairs and testing improperly required by the Bureau.

We have sustained the appeal as to 699 special hydrostatic tests which we have concluded could not reasonably be required at Cen-Vi-Ro's expense. It therefore becomes

²⁰⁰ See *Steenberg Construction Company* (note 159, *supra*); at 44,044 (absence of details as to items included in general expense accounts, held to preclude application of a straight percentage factor for overhead and profit).

²⁰¹ Paragraph 7 entitled "Extras" of the General Conditions. Actual necessary cost is defined as including " * * * all reasonable expenditures for material, labor (including compensation insurance and social security taxes), and supplies furnished by the contractor, and a reasonable allowance for the use of his plant and equipment, where required, but will in no case include any allowance for office expenses, general superintendence, or other general expenses." See *Perry & Wallace, Inc. v. United States*, 192 Ct. Cl. 310 (1970), construing a very similar clause.

necessary to determine the cost of such tests.

Mr. Franklin estimated the cost of hydrostatic tests as in excess of \$200 per pipe (Tr. 341). Mr. Peterson testified that the cost of special hydrostatic tests in the south plant was \$180 to \$200 and near \$300 in the north plant (Tr. 1028). We find that these estimates are overstated. Mr. Franklin testified that it took over three hours to perform a hydrostatic test (Tr. 346). This time includes handling the pipe on the test stand, coupling of the pipe with the test apparatus, a minor soak period of possibly 20 minutes and the actual test time of 20 minutes. It does not include time required to move the pipes from the yard and return. It therefore appears that the test time as stated by Mr. Franklin applies to the period after May 19, 1965, when the soak period was eliminated at Cen-Vi-Ro's option. The test equipment was such that ordinarily two pipes were tested at one time. Cen-Vi-Ro asserts that one test of two of the smaller pipes produced under DC-6130 could be completed in an average of $2\frac{1}{2}$ hours utilizing the services of one foreman, two laborers and a fork-lift operator (Exh. 81K, p. F-7). While we assume that more time would be required to conduct a test for the larger size pipe, it does not appear that any additional personnel would be involved. We conclude that a hydrostatic test under DC-6000 involving two pipes could be completed in an average of four hours. The equitable adjustment, ex-

clusive of indirect job costs, is then computed as follows: \$2.784 (average man-hour payroll cost of \$2.024 plus adders of \$.52 and \$.24) \times 8 (four men at two hours per pipe) \times 699 (number of excess tests) = \$15,566.73.²⁰² Indirect job costs will be considered in a separate portion of this opinion.

Manufacture of Excess Rejects

In computing this claim, Cen-Vi-Ro subtracted total tons of pipe sold on DC-6000 (asserting 360,985, which includes 54- and 72-inch pipes produced in the north plant for DC-6130) from tons of pipe produced (398,591, which again includes 54- and 72-inch pipes manufactured for DC-6130), deducted a one percent reject rate allegedly anticipated in the bid and seeks to charge the Government with the remaining tonnage of 33,664 less a credit for repairs (Tr. 978, 983; Exh. 5M, p. F6). Based on total pipe production under both contracts of 447,499 tons and total man-hours of 1,097,667, Cen-Vi-Ro determined an average of 2.44 man-hours to produce a ton of pipe.²⁰³ Average man-hours to produce a ton of pipe were then

²⁰² For comparison purposes, we note that Cen-Vi-Ro computed the cost of 381 allegedly excessive hydrostatic tests under DC-6130 at \$7,038 (Exh. 81K, pp. F-7 and F-8).

²⁰³ P. 9, Answers to Interrogatories, Exh. 129. The Government determined total man-hours at 1,005,425 and total pipe production as 433,970.9 tons for an average for both contracts of 2.317 man-hours per ton (Man-Hour per Ton Study, note 198, *supra*). The difference in man-hours is not explained. Since Cen-Vi-Ro alleges that all supervisory costs are included in indirect job costs, it does not appear to be due to the fact that submitted payrolls in accordance with the Davis-Bacon

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applied to the reject tonnage to reach a total of 82,140 manhours (Exh. 5M, p. F6). Labor at \$2.024 per hour, plant and equipment support costs of \$2.29, small tools of \$.24 and indirect job costs of \$.87 per man-hour were applied to the allegedly excess man-hours to reach a total of \$445,528. This figure was reduced by \$50,000 to account for the cost of repairs. If Cen-Vi-Ro's contention that approximately 50 percent of the 1,670 rejected pipes in the yard on June 20, 1966, was repairable in accordance with the Manual is accepted, this would result in an average repair cost of approximately \$60 per pipe. However, Mr. Peterson stated that the \$50,000 was an estimate on the order of \$30 or \$40 a joint, based on all joints (Tr. 1072).

Since the foregoing is the claimed labor and associated plant and equipment costs applicable to the allegedly excess rejects and does not include material costs, we will defer our discussion on this aspect of the claim pending consideration of material costs.

Cost of Material in Excess Rejects

In computing this aspect of the claim, Cen-Vi-Ro determined an

Act would not necessarily include foremen, and other supervisory employees. However, acceptance of the Government's figure in the absence of a change in total labor dollars would compel an upward revision in hourly labor costs. The difference in tonnage of pipes produced appears to be due to methods of computing average weight for each size and class of pipe (letter from Department counsel to counsel for Cen-Vi-Ro, dated July 30, 1970). Under the circumstances we accept Cen-Vi-Ro's figures.

average content per ton of pipe for steel (cement, sand and coarse aggregate usage was determined on the basis of the average per ton of concrete), applied the resulting figures to the allegedly wrongfully rejected tonnage and added a five percent factor for waste (Exh. 5M, p. F11). Mr. Peterson testified that the standard mix and the associated materials were applied to the net weight of the concrete in the rejected tonnage and that required reinforcing steel was based on the average weight in each size and class of pipe produced (Tr. 1072, 1073; see also Explanation of Steps in Computing the Extent of Damages, Exh. 5M, pp. E2 and E3).

Reinforcing steel was computed at an average of .0432 tons per ton of pipe which applied to the rejected tonnage of 33,664 equals 1,454 tons. This figure was multiplied by the asserted cost of \$126.56 per ton which equals \$184,018. Cement usage was computed as an average of .7621 barrels per ton of concrete. Tons of concrete in the rejected pipe were determined by subtracting 1,454 tons of reinforcing steel from 33,664 (tonnage of allegedly wrongfully rejected pipes) and applying the result (32,210) to the average barrels of cement per ton of concrete which equals 24,547 barrels. This figure multiplied by the asserted net cost per barrel of cement (\$4) equals \$98,188. Sand usage was computed at .2782 tons per ton of concrete which multiplied by 32,210 equals 8,961 tons. This figure times the asserted cost of \$2.57 per ton

equals \$23,030. Coarse aggregate usage was determined as .5394 tons per ton of concrete which multiplied by 32,210 equals 17,374 tons. This figure multiplied by the asserted cost of \$3.37 per ton equals \$58,550. The total cost of the above materials equals \$363,786 to which Cen-Vi-Ro applied a five percent waste factor to reach the amount claimed of \$381,975. Mr. Peterson testified that the five percent waste factor was determined from Cen-Vi-Ro records (apparently on other jobs) and the estimate (amount for waste not stated). He asserted that in many instances waste factors were actually higher (Tr. 1074).

It is clear that in seeking to charge the Government for all rejected tonnage above the one percent anticipated in the estimate (Tr. 983), Cen-Vi-Ro has adopted a variation of the total cost approach.²⁰⁴ In this connection, we note that final rejects allocated to the months in which the pipes were produced, were less than one percent of production in only two months, 0.5 percent in February and 0.9 percent in April 1966 (Exh. 5Q). Mr. Peterson admitted to having agreed at a conference with Bureau representatives in January 1967, that a two percent rejection rate would probably have been more realistic (Tr. 1067). However, he defended the one percent estimate by asserting that licensee plants using the Cen-

Vi-Ro process had previously experienced rejection rates substantially less than one percent (Tr. 1068). He asserted that in view of the volume of production the fact that the plant was new and that personnel were to be trained should not affect the result. We note that Mr. Hubbard expressed the opinion that final rejects normally expected due to accidental damage and other factors should not exceed one-half of one percent (letter to Raymond International, Inc., dated July 2, 1965, Cen-Vi-Ro Correspondence). This statement was, of course, made over a year after the plant had commenced operations.

Cen-Vi-Ro, relying on Mr. Peckworth's estimate, argues that only 50 percent of the pipes were properly rejected and asserts that of this quantity, the pipes rejected for flaking are due to the Bureau's actions in forcing Cen-Vi-Ro to deviate from its normal manufacturing procedure (Brief, p. 46). Cen-Vi-Ro computes an actual reject rate of approximately 11½ percent. However, this computation assumes production of 60,000 pipes under both contracts (actual production appears to total 55,719, Exhs. 5Q and 81R), assumes final rejects of 3,000 (actually final rejects for both contracts appear to be 2,923), and final rejects for flaking of 600 while actual rejects for this reason (including rejects for bad interiors) are approximately 364 (352 in yard on June 20, 1966, plus 12 rejected under DC-6130). Accepting for the moment, Cen-Vi-Ro's assumptions that

²⁰⁴ See, e.g., *Bruno Law v. United States*, 195 Ct. Cl. 370 (1971) (total time approach to proving delay is no more acceptable than total cost method of proving damages).

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pipes rejected for flaking and bad interiors were the responsibility of the Bureau, and that one-half of the remaining rejects should have been accepted as repairable under the Manual, the reject rate, using the actual figures cited above, is in excess of two percent.

Although Mr. Peterson's testimony concerning rejection rates experienced in other plants affords support for the anticipated one percent rejection rate as reasonable, we conclude that it was over optimistic in view of the fact that a plant for the manufacture of pipe had to be constructed, the 20-foot spinner had not previously been used to manufacture reinforced concrete pipe and that labor relied upon was largely inexperienced and unskilled. In any event, we cannot accept Cen-Vi-Ro's claim presentation since the evidence does not support the contention that the quantities of pipe alleged by Cen-Vi-Ro were improperly rejected and could have been satisfactorily repaired in accordance with the Concrete Manual.

We have, however, sustained the appeal as to 107 pipes which were wrongfully rejected. Twenty-nine of these pipes are 54-inch, 25 are 60-inch, eight are 66-inch x 16-foot, 25 are 66-inch x 20-foot and 20 are 72-inch pipes. Forty-three of these pipes had been repaired.

Although Mr. Peterson testified that the job was not set up to account for costs on every piece of pipe (Tr. 973, 974), we think that the costs of these pipes may be determined with reasonable certainty. It

appears that a 72-inch by 20-foot pipe weighs approximately 18 tons, that a 66-inch by 20-foot pipe weighs approximately 15 tons, that 66-inch by 16-foot pipe weighs approximately 13 tons, that a 60-inch by 16-foot pipe weighs approximately ten tons and that a 54-inch by 16-foot pipe weighs approximately 8.1 tons ("Flier" issued by Cen-Vi-Ro dated November 29, 1965, advertising the sale of "good" reject pipe, Exh. 28). This computes to a total of 1,323.9 tons of concrete and steel in the 107 rejected pipes. Applying this tonnage to labor and associated plant and equipment support costs (exclusive of indirect job costs) of \$10.61 per ton ($\$2.024 + \$2.09 + \2.44×2.44) and material costs of \$11.35 per ton (\$5.47 steel, \$2.92 cement, \$.68 sand and \$1.74 aggregate) inclusive of five percent waste, we conclude that the cost of manufacturing these 107 pipes was \$29,072.84. From this figure we subtract \$3,200 representing the cost of repairing 64 of the pipes to reach a total of \$25,872.84. Indirect job costs, overhead and profit will be considered in a subsequent portion of this opinion.

Loss of Efficiency

Cen-Vi-Ro has computed this portion of the claim upon the basis of the difference between the average number of pipes produced during the period March 1966 through the completion of pipe production in June 1966 (stated as 1,720 pieces per month) and the average pieces

(1,409 per month) produced during the period May 1965 through February 1966 (Exh. 5M, pp. F12 and F13). The difference of 311 was multiplied by ten which at the rate of production during the last $3\frac{1}{2}$ months represented approximately 1.8 months of production. This figure was then multiplied by the asserted average monthly operating cost of \$220,000 to reach the amount claimed of \$396,000. Mr. Peterson testified that the average monthly operating cost was determined by dividing total job costs by the number of months the plant was operated (Tr. 1035).

Relying on the so-called "Rice" doctrine, the Government asserts that this claim is beyond the jurisdiction of the Board (Appendix to Brief, pp. 15, 36, 37). We consider that we have jurisdiction.²⁰⁵

Combining the man-hours involved in the claims for excess testing and repairs, the cost of manufacturing excess rejects and the claim for lost efficiency, the Government calculates that Cen-Vi-Ro is attempting to charge the Bureau for 61.10 percent of the total man-hours worked from May 1965 through February 1966 (Appendix to Brief, pp. 17-20). The Government therefore asserts that there are gross duplications in the costs claimed since the same period of time and the same pieces of pipe are involved. Cen-Vi-Ro does not contest the Government's calculations, but asserts that the number of man-

hours required to manufacture a ton of pipe during the May 1965 through February 1966 period was 70 percent higher than the man-hour per ton figure for the last $3\frac{1}{2}$ months of production (Reply Brief, pp. 20, 21). Cen-Vi-Ro asserts that these figures merely confirm the excessive man-hours caused by the Bureau's actions. Cen-Vi-Ro also argues that the contractor had to work 1.8 months longer than it would have had it been permitted to manufacture at the rate of the last $3\frac{1}{2}$ month period and that the contractor should be able to recover this sum in addition to excessive manufacturing costs incurred during the May through February period.

Since we have rejected for lack of proof the principal portion of appellant's claims for excess rejects, the duplications of which the Government complains are not a substantial factor in our determination. We have found that appellant is entitled to an equitable adjustment for disruption costs associated with the interim wrongful rejection of 1,121 pipes. For the great majority of these pipes (1,013 rejected for scaling), the rejection or disruption period was from May 16 through the end of September 1965 or $4\frac{1}{2}$ months. The Man-Hour per Ton Study (Exh. 150) indicates that an average of 3.109 man-hours were required to produce a ton of pipe from the beginning of production in May of 1964 through May 15, 1965, as compared with only 1.992 man-hours to produce a ton of pipe from

²⁰⁵ *Bruno Law v. United States* (note 204, *supra*) and cases cited.

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May 16, 1965, through the completion of production in June of 1966. The Government asserts that since man-hours required to produce a ton of pipe declined after May 15, 1965, the May 13 letter and Bureau actions based thereon were beneficial to Cen-Vi-Ro, thereby precluding any recovery. We do not think it can seriously be contended that the rejection during the May 15 inventory of 1,121 pipes, which we have determined was improper, was a benefit to the contractor.²⁰⁶ We have no doubt that the rejection of this substantial quantity of pipes had an adverse effect on the contractor's operations with a consequent decrease in what the efficiency would have been but for the rejection.

The equitable adjustment could be computed by comparing the man-hours required to produce a ton of pipe during the disruption period with the man-hours required to produce a ton of pipe during the following 4½ month period.²⁰⁷ Utilization of the period immediately following the disruption period as a basis for determining normal or average man-hours per ton overcomes the Government's objection that Cen-Vi-Ro has used the period of maximum efficiency in computing

its claims. During the 4½ month period, May 16, 1965, through September 1965, Cen-Vi-Ro utilized 275,968 man-hours in producing 102,482.6 tons of pipe or an average of approximately 2.69 man-hours per ton (Man-Hour per Ton Study, Exh. 150). During the following 4½ month period (ending in mid-February 1966) Cen-Vi-Ro expended 197,838 man-hours in producing 105,172.8 tons of pipe or an average of approximately 1.88 man-hours per ton. Applying the difference between the average man-hours per ton during the two periods (.81) to tons produced during the disruption period results in 83,011 theoretical excess man-hours. These are, of course, based on the Government's figures. While counsel objected to the admission of the Man-Hour per Ton Study, Cen-Vi-Ro has not shown that the computations are erroneous.

However, we conclude that the foregoing method is unrealistic in this instance since use of all pipes produced during the disruption period would insufficiently recognize Cen-Vi-Ro's responsibility which we have determined is substantial, for the excess man-hours. Since the 1,121 wrongfully rejected pipes represent approximately 30.2 percent of the 3,714 pipes rejected during the May 15 inventory under both contracts, including 500 marked for special hydro, we will apply this percentage to total excess man-hours during the disruption period (83,011) to determine excess man-hours applicable to

²⁰⁶ The ASBCA dismissed as "manifestly untenable" a similar Government contention that a contractor was benefited by late delivery of GFP. *Allegheny Sportswear Co., Division of New York Pants Co., Inc.*, ASBCA No. 4163 (March 25, 1958), 58-1 BCA par. 1684.

²⁰⁷ See *M.K.O.*, ASBCA No. 9740 (December 27, 1965), 65-2 BCA par. 5288 (claim for equitable adjustment held properly computed on basis of average or normal production as compared to reduced rate due to defective specifications).

wrongfully rejected pipes. This results in a total of 25,069.32 man-hours which times hourly labor and equipment support costs of \$4.35 (\$2.024 + \$2.09 + \$.24), exclusive of indirect job costs, equals \$109,051.-54. The foregoing computation is, of course, based upon the assumption that inefficiencies during what we have determined to be the disruption period are primarily related to pipes rejected during the May 15 inventory. We recognize that this assumption may not be entirely accurate. However, on this record we think it represents the most appropriate method of determining the amount due. Indirect job costs, overhead and profit, are considered in a separate portion of this opinion.

*Payment to Pipe Laying
Subcontractor (R. H. Fulton) for
Delays in Shipping*

The Government, again relying on the "Rice" doctrine, moves for the dismissal of this claim upon the ground it is for damages of a consequential nature and thus beyond the jurisdiction of the Board. Since it is now settled that the "Rice" doctrine does not preclude the recovery of increased costs of unchanged work which are directly attributable to and flow from a change, we hold the Government's motion is lacking in merit.²⁰⁸

²⁰⁸ *Bruno Law v. United States* (note 204, *supra*). We have recently pointed out that most contract claims could be cast in the form of breach claims allegedly beyond the jurisdiction of the Board. *Steenberg Construction Company* (note 159, *supra*) at 43,945.

Turning to the merits we have determined that the Bureau did not misinterpret the contract as to permissible internal diametric tolerances as alleged by Cen-Vi-Ro. However, even if our decision on this question had been otherwise, the evidence in regard to this claim is unsatisfactory. First, we are not convinced that Cen-Vi-Ro would have been able to produce sufficient quantities of acceptable pipe so as to avoid a shutdown by the laying subcontractor in the absence of problems with the internal diameter of the pipe. Mr. Franklin testified that the 20-foot spinner was essentially out of operation during the September 1, 1964, to January 1, 1965, period.²⁰⁹ He also admitted that production was sometimes curtailed during this period because of a shortage of forms (note 16, *supra*). Second, we have found that small diameter pipe was not recognized as a significant problem until October of 1964 (note 63, *supra*). However, at a meeting on September 21, 1964, R. H. Fulton was advised by Cen-Vi-Ro that laying operations would have to be suspended for two months (memorandum, dated September 22, 1964, Cen-Vi-Ro Correspondence). While the memorandum does not state the reason for the proposed shutdown, it can hardly be doubted that the

²⁰⁹ Note 15, *supra*. The letter, dated October 30, 1964, summarizing a meeting held with Cen-Vi-Ro representatives on October 28, 1964 (Exh. 9), reflects that Cen-Vi-Ro was asked to comment on Government procedures that were delaying the work. The contractor's reported response was that he was cognizant of no such procedures either at the plant or at the laying site.

cause was a shortage of acceptable pipe. The evidence does not establish that this shortage was attributable to actions of the Bureau.

Another basic difficulty with this claim is that the evidence of the cost basis for the payment to R. H. Fulton is unsatisfactory. Mr. Franklin testified that the \$100,000 payment was to settle a claim by R. H. Fulton for twice that amount.²¹⁰ At the meeting of September 21, 1964, between representatives of Cen-Vi-Ro and R. H. Fulton referred to above, Mr. Fulton is quoted as saying that his maximum figure for labor (to hold key personnel) and for down time on equipment was \$12,500 a week. There is no other evidence of the costs supporting this claim. The subcontract between Cen-Vi-Ro and R. H. Fulton is not in evidence. At the referenced meeting R. H. Fulton was advised that the subcontract gave Cen-Vi-Ro the right to suspend Fulton's laying operations as long as due notice was given. In addition, we note that a letter from Raymond International, Inc., to R. H. Fulton, dated April 26, 1965 (Cen-Vi-Ro Correspondence), asserts that Cen-Vi-Ro was prepared to resume pipe deliveries on February 1, 1965, and that subsequent delays were for the convenience of R. H. Fulton.

The Board finds that the evidence does not establish Government responsibility for the payment to R.

H. Fulton. This portion of the claim is denied.

Indirect Job Costs, Overhead and Profit

We have determined that Cen-Vi-Ro is entitled to additional compensation as follows:

Surplus cages-----	\$39, 231. 35
Special Hydrostatic Tests----	15, 566. 73
Pipes Improperly Rejected----	25, 872. 84
Loss of Efficiency-----	109, 051. 54
Total -----	189, 722. 46

The above sums are exclusive of indirect job costs, overhead and profit. In view of the fact that indirect job costs have not been specifically identified and in view of the provisions of the "Extras" Clause (note 201, *supra*), we add 15 percent of the above sum which equals \$28,458.37. These figures total \$218,180.83. Claims for additional indirect job costs, overhead and profit are denied.

Interest

While not claiming any specific amount, appellant asserts that it is entitled to interest on money borrowed to finance extra work caused by the Bureau's actions (Brief, p. 53). The record indicates that monies to perform the work were advanced by Raymond International, Inc., and that these sums were to be repaid together with interest at an unstated rate over the period Cen-Vi-Ro had use of the funds (Tr. 1026, 1027 1095, 1096). A letter from First National City Bank to Ray-

²¹⁰ Note 18, *supra*. A letter from R. H. Fulton to Cen-Vi-Ro, dated October 28, 1966, refers to the \$100,000 payment as damages for delays due to lack of acceptable pipe from the beginning of delay to September 23, 1965 (Cen-Vi-Ro Correspondence).

mond International, Inc., dated October 2, 1970 (App's Exh. P), summarizes changes in the prime rate of interest from August 23, 1960, to September 22, 1970. Interest sought is based on rates in this letter.

There is no evidence of any specific loan transactions or interest payment by Cen-Vi-Ro in the record. Interest has been allowed as part of an equitable adjustment when it has been shown to have been incurred specifically to fund a change.²¹¹ The evidence herein falls short of that minimal standard. The claim for interest is denied.

DC-6130

We have previously alluded to Cen-Vi-Ro's difficulties in producing acceptable pipe for the prime contractor, R. H. Fulton, under this contract. As we have seen, 261,586 linear feet or approximately 38 percent of the 682,142 feet of pipe to be furnished under this contract was to be noncylinder prestress.²¹²

Cen-Vi-Ro's Claims

R. H. Fulton under date of July 15, 1966 (Exh. 81J), forwarded a

²¹¹ *Baltimore Contractors, Inc.*, ASBCA No. 14819 (June 27, 1972), 72-2 BCA par. 9554; cf. *Sun Electric Corporation*, ASBCA No. 13031 (June 30, 1970), 70-2 BCA par. 8371.

²¹² Note 9, *supra*. Although the contract permitted 23,280 ft. of 42-inch diameter pipes to be RCP (Exh. 79), Cen-Vi-Ro proposed to furnish only 1,790 ft. of RCP pipe in 42-inch diameter (A75 and B75) and the balance of such pipe was to NCP (Exh. 81P). Cen-Vi-Ro appears to have subcontracted manufacture of all but 2,018.50 feet of 42-inch pipe to Gifford-Hill-American (Exh. 81K, p. 9-9 & 11). Consequently, pipes referred to in this portion of the opinion are principally 18 through 27 inches in diameter.

notice of claim, dated June 28, 1966, from Cen-Vi-Ro (Exh. 81I). The notice stated four reasons for the claim which may be summarized as unwarranted special hydrotesting, rejection of serviceable pipe or pipes that could have been made so under the specifications, extraordinary repairs and superficial dressing up of pipes which were not required by the specifications, and arbitrary inspection, principally in the rejection and later acceptance of the same pipes. Cen-Vi-Ro's formal claim, dated November 7, 1966 (Exh. 81K), in the amount of \$976,926 was forwarded to the Bureau by R. H. Fulton on December 2, 1966 (Exh. 81L). The contracting officer refused to consider the claim until R. H. Fulton filed legal authorization permitting Cen-Vi-Ro to pursue the claim. A power of attorney, dated November 24, 1967, permitting Cen-Vi-Ro to pursue the claim in the name of R. H. Fulton was furnished by letter, dated April 26, 1968.²¹³ The claims were denied in their entirety by the contracting officer (Findings of Fact and Decision, dated October 18, 1968, Exh. 81). The claims will be considered in the

²¹³ Cen-Vi-Ro has asserted that the Bureau had an obligation to make a finding to R. H. Fulton on the claim and has disputed the necessity for the power of attorney (letter, dated May 20, 1968, Exh. 81(10)). Cen-Vi-Ro is correct in this assertion. See *Owens-Corning Fiberglass Corp. v. United States*, 190 Ct. Cl. 211 (1969) and cases cited. Cf. *Holder Construction Company*, GSBGA No. 1913 (June 10, 1968), 68-1 BCA par. 7072, on reconsideration (existence of dispute between Government and prime is a prerequisite to Board jurisdiction of claim on behalf of subcontractor).

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order in which they were determined by the contracting officer.

*Noncylinder Prestress Concrete
Pipe*

Approximately 68 percent of Cen-Vi-Ro's claims under DC-6130, or \$660,794.40, is asserted under this heading. The amount claimed includes loss on outside purchase of pipe above sales price to R. H. Fulton, lost profit on sales, loss on prestress set-up expense and prestress equipment and increased plant write-off occasioned by the lesser tonnage produced (Exh. 81K, p. F-1).

As we have found previously, Cen-Vi-Ro manufactured the first NCP pipe core on April 2, 1965, and wrapping, testing and coating of the cores commenced on June 3, 1965. A brief description of the manufacturing process is as follows: longitudinal rods were installed in the form, the concrete core was spun, the core was steam cured, the form was stripped and in the process stress on the rods was transferred to the concrete, after further aging the core was wrapped with steel wire under high tension, the core was hydrostatically tested and if it passed the test, a cement paste was applied to the outside of the core, followed by a mortar encasement (Tr. 922, 923; Subparagraph 79.e.3., Specifications DC-6130). Each core was required to withstand a hydrostatic test of 125 percent of design head for four minutes without cracking or leakage appearing on the surface (Subparagraph 79.i.).

Cen-Vi-Ro's difficulties in manufacturing NCP pipe are best related through the testimony of Mr. Murray, Cen-Vi-Ro's production manager from January 1 to July 10, 1965. He admitted that there were many hydrostatic test failures which contributed to irregular production and curtailed activity on the wire wrapping machine.²¹⁴ He stated that the leaks occurred at the spigot end where there was a raised section to provide for one side of the spigot gasket groove (Tr. 928, 929; Dwg. No. 662-525-1990, Exh. 81U). Leakage also occurred at the anchor lug for the prestressed wire.²¹⁵ The pressure was reduced and the pipes were accepted at a lower head where no leakage occurred (Tr. 930). This testimony was confirmed by Mr. M. R. Powell, one of the Bureau's chief shift inspectors at Cen-Vi-Ro's plant after May 27, 1965 (Tr. 1264, 1265). This practice was referred to as downgrading.

Subparagraph 79.g.(2) of the specification provides in part:

* * * * *

Where embedded pretensioned reinforcement is used, the pretension stress shall be maintained, by suitable supports, during the placing and curing of the pipe

²¹⁴ Tr. 925, 926. An Inspectors Daily Report, dated June 25, 1965 (Exh. 100) quotes Mr. Hubbard as saying that his people have no complaints concerning testing prestress pipe, but the pipes just are not what they are supposed to be.

²¹⁵ On page 2 of his memorandum of July 8, 1965, Mr. Murray described the areas of leakage as follows: "2. The hydro leaks show up at the seam, around the anchor lug, at the secondary flange and porosity in the barrel, particularly where the slope ring reduces the wall thickness."

core until the concrete in the core has attained a strength equal to 1.8 times the longitudinal induced compression in the concrete. Suitable end anchorage devices shall be provided at each end of the longitudinal reinforcement capable of developing the full strength of the reinforcement. * * *

Mr. Murray testified that Cen-Vi-Ro had a problem in losing the "upset button" on the end of the prestress rod during prestressing operations (Tr. 926, 927). He stated that the problem of longitudinal rod failure was not entirely solved before he left the job.

In his memorandum of July 8, 1965, Mr. Murray described the problems involved in the manufacture of pipe in terms of penalties. He divided them into the following categories:

1. Inconsistent materials.
2. Erratic and untrained labor.
3. Form and equipment maintenance.
4. Long period storage.
5. Strict inspection resulting in costly special efforts, excessive special hydrostatic testing, and rejected pipe.²¹⁰

Two additional major categories ("penalties") applicable to DC-6130 production were listed as:

1. Congestion in the spinning area.
2. Congestion and poor handling facilities in the stripping area. * * * The congestion in both areas is built in and would be prohibitive to change.

The memorandum stated that all of the foregoing problems were applicable to NCP production as well as others known and unknown:

* * * Something causes separation or slump between the fresh concrete and the

²¹⁰ These problems were also stated to be present in the production of RCP pipes.

form on cores with prestress longitudinal.

We don't know whether we crack all of the secondary flanges during stripping operations or if we crack part of them when we release stress on tennons (sic) one at a time.

* * * * *

5. We know the longitudinals have defective upset button and washer fabrication requiring makeshift measures at the stripping area.

6. The stripping reassembly and longitudinal prestress process requires excessive manhours of hard work.

7. With the aggregate, when we mix dry enough to stop slump we have rocky bells. When we mix wet enough for good bells, we have slump in the barrel.

8. On 95% of the cores, repair work is required on either the secondary flange, or the seam, prior to prestressing or testing.

9. The on and off handling at the coating machine is time consuming.

10. The maintenance on belts, couplings, and the slurry spray is already costly.

11. The rebound yield of 40% to 50% will result in high cement cost for coating throughout production.

* * * * *

By farming out this footage, we could help ourselves in several ways:

* * * * *

5. * * * It's obvious from the test results run so far that these improvements need to be developed much further before our high pressure pipe can be competitive under strict Bureau inspection with the class of labor available. The production process, and equipment need further development before we can be competitive on large schedule production.

Mr. Murray recommended that manufacture of all pipes with heads of 150 feet or above be subcontracted. He testified that although he thought Cen-Vi-Ro could pro-

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duce the required pipe, he didn't think they could do it economically (Tr. 932).

In a letter, dated July 19, 1965, forwarded to the Bureau by R. H. Fulton (Exh. 84), Cen-Vi-Ro stated that the failure of the rod upset holding the anchor washer occurred after the core was cured and stripped. Cen-Vi-Ro requested permission to waive the end anchor requirement as to pipes where only beam action was a prime design factor. In a letter, dated July 22, 1965, forwarded to the Bureau by R. H. Fulton (Exh. 86(1)), Cen-Vi-Ro requested use of bond strength as suitable end anchorage between the pipe core and longitudinal rods and listed the classes of pipes where Cen-Vi-Ro considered such strength would be satisfactory.

By letter dated August 11, 1965 (Exh. 87), the chief engineer stated that end anchorage was not absolutely necessary in all pipe classifications provided the prestressing rods were not broken other than at the retaining washer and the concrete in the core had attained 4,500 p.s.i. before prestressing forces applied to the end rings had been released to the concrete. The letter furnished a revised list of pipe classes which could be accepted at the discretion of the inspector where the above criteria were met. Forty-five pipes with broken pretension rods or end anchorage failures were downgraded and accepted in accordance with this authorization at a lower head (Exh. 81V).

An Inspectors Daily Report, dated September 1, 1965 (Exh. 100), states that all NCP cores would be reclaimed except those which indicated rods were broken prior to stripping.

Cen-Vi-Ro produced a total of 865 NCP pipes of which 635 totaling 9,776 linear feet were accepted (Summary of Noncylinder Prestress Pipe Produced, Exh. 93). Of the accepted pipes 355, including the 45 with broken pretensions rods or end anchorage failures referred to above, were accepted at a lower head than for which the pipes were manufactured (Exh. 81W). Cen-Vi-Ro was apparently unable to overcome problems associated with the production of NCP pipe (Tr. 1267) and ceased production of NCP pipes by the end of August 1965 (Inspectors Daily Report, dated 8-31-65, Exh. 100). Manufacture of the balance of the NCP pipes totaling 251,810 linear feet and a substantial quantity of high head RCP pipes was subcontracted to Gifford-Hill-American, pretensioned concrete pipe being substituted for NCP.²¹⁷

Cen-Vi-Ro alleges that abandonment of prestress production was due to overly critical and arbitrary inspection by the Bureau (Statement of Claim, Exh. 81K, p. A-1).

²¹⁷ Pretensioned concrete pipe, an option permitted by the specifications, was reinforced with a sheet steel cylinder in addition to steel bars (Par. 78, Specifications DC-6130). It appears that manufacture of 89,086.54 linear feet of RCP pipe was also subcontracted to Gifford-Hill-American (Exh. 81K, pp. F-9 to F-13).

This allegation is amplified on pages C-12 through C-14 of the claim:

In the area of pre-stressed (sic) production surveillance inspection on production and finished product inspection was the single most cause (sic) of delays and unproductive activity. It is inconsistent in a manufacturing process to demand certain requirements in the process and not approve the finished product.

* * * * *

It became readily apparent that very little of the Non-Cylinder Pre-stress Pipe (sic) was ever going to be released. Not only could management foresee extremely high costs to produce and manufacture the pipe out (sic) through such superfluous activity delivery schedules would fall behind. This could only lead to delay claims by the pipe laying contractor and jeopardize the contract completion date. Therefore the most expeditious route was to use a product requiring little inspection to determine structural competence which would alleviate the burden of judgment by inexperienced field inspection personnel.

The severe inspection and arbitrary techniques used by inspectors made it impossible for the contractor to get his plant operating efficiently.

* * * * *

Although Mr. Hubbard indicated that problems in production under DC-6000 delayed production under DC-6130 (Tr. 1101, 1123), there is no persuasive evidence that Cen-Vi-Ro's difficulties in producing NCP pipes and its decision to subcontract the manufacture of high head pipes were attributable to actions of the Bureau.

Decision

On brief, the Government asserts that this claim is for alleged arbitrary Bureau inspection and consequential damages and is thus beyond

the jurisdiction of the Board (Appendix to Brief, pp. 27, 36 asserted²¹⁸ except for the claim for lost profits.²¹⁹

On the merits the evidence simply does not support Cen-Vi-Ro's allegations of overly critical, arbitrary and severe Bureau inspection. The uncontradicted evidence supports the conclusion that Cen-Vi-Ro encountered unanticipated difficulties in manufacturing NCP pipes which would successfully pass hydrostatic tests and upon which required stresses on longitudinal reinforcing rods and end anchorage devices could be maintained. On the evidence presented these difficulties may not be attributed to acts of the Bureau. Appellant's production manager testified that while he thought at the time that Cen-Vi-Ro could produce the required pipe, he did not think they could do it eco-

²¹⁸ We consider that the claims are not readily distinguished from those based on the imposition of excessive standards of workmanship. See, e.g., *Chris Berg, Inc. v. United States*, Ct. Cl. No. 231-68 (February 18, 1972, Slip Opinion) (claim based on imposition of excessive standards of workmanship considered under Wunderlich Act standards). Cf. *F. H. Antrim Construction Co., Inc.*, IBCA-882-12-70 (July 28, 1971), 71-2 BCA par. 8983 (claim for alleged interference with the work by a project inspector who was not shown to have authority to bind the Government dismissed).

²¹⁹ Appellant's claim under this heading includes \$93,688 for loss of profit on sales of pipe purchased from Gifford-Hill-American (Exh. 81K, p. F-1). It is clear that an equitable adjustment excludes unearned or anticipated profits; *General Builders Supply Co., Inc., et al. v. United States*, 187 Ct. Cl. 477 (1969), and that this Board has no jurisdiction over such claims. *American Cement Corporation*, IBCA-496-5-65 and IBCA-578-7-66 (September 21, 1966), 73 I.D. 266, 66-2 BCA par. 5849, affirmed on reconsideration (January 10, 1967), 74 I.D. 15, 66-2 BCA par. 6065.

nomically. The Board finds that Cen-Vi-Ro's decision to subcontract the manufacture of high pressure pipe was not caused by actions of the Bureau, but was attributable to economic considerations related to the above production difficulties. The claims concerning noncylinder prestress concrete pipe are dismissed insofar as they assert entitlement to lost profits and are otherwise denied.

Repair of Insignificant Air Holes

Subparagraph 77.h.(4)(g) of the specification provides as follows:

(g) The surfaces of the bell and spigot in contact with the gasket, and adjacent surfaces that may come in contact with the gasket within a joint movement range of three-fourths inch, shall be free from airholes, chipped or spalled concrete, laitance, or other defects, except that individual airholes may be repaired as provided in subparagraph j.(2).

Subparagraph j.(2) provides in part:

Individual airholes in gasket bearing areas of precast cement pipe may be filled with a hand-placed, stiff, preshrunk 1:1 mortar of cement and fine sand with no other preparation than thorough washing with water. Such fillings shall be kept moist under wet burlap for at least 48 hours or steam cured as required in Subparagraph e.(4)(a) for a minimum of 12 hours. All other repairs shall be made in accordance with the procedures of Chapter VII of the Seventh Edition of the Bureau of Reclamation Concrete Manual.²²⁰

²²⁰ The specification for noncylinder prestress pipe (Subparagraphs 79.h.(1)(g) and 79.j.(2)) contains identical provisions. However, we interpret this aspect of the claim as being limited to reinforced concrete pipe. Even if this conclusion is erroneous, we find no merit in the claim.

Cen-Vi-Ro alleges that it was required to expend considerable time and money in patching extremely small air holes in the gasket area of the pipe bell which did not affect the water tightness, serviceability or the structural strength of the pipe (Exh. 81K, p. C-3). Cen-Vi-Ro further alleges that the intent of the specifications was not to require patching of air holes of such a minor nature that the integrity of the pipe was not affected and asserts that the patching was actually more harmful in that it resulted in a bell less true than that formed by machined bell rings.

We have previously referred to Cen-Vi-Ro's letter of November 8, 1965 (Exh. 5N, p. 34; Exh. 81G), protesting the requirement that all minor holes in the bells be filled with epoxy or other patching material and the Bureau's reply of December 6, 1965 (Exh. 5N, p. 21; Exh. 81H), agreeing that all bells did not require repair and pointing out that the practice of coating all bells with epoxy was a production expedient adopted by Cen-Vi-Ro. The evidence supports the accuracy of the statements in the Bureau's reply to the protest.

Mr. Herrera testified that the Bureau required the repair of air holes a quarter of an inch or larger and that partly because of the number of holes, but mainly because Cen-Vi-Ro did not have personnel experienced to determine which holes required repair and which did not, he directed that each bell be coated with epoxy (Tr. 806, 807, 823, 829). In his testimony, Mr. Herrera

did not distinguish between pipes produced under DC-6000 and those produced under DC-6130. An Inspectors Daily Report, dated April 21, 1965 (Exh. 100), states that even though bell surfaces looked "real good" patchers were told by Mr. Leigh Lloyd of Cen-Vi-Ro to continue use of epoxy on gasket surfaces of every pipe so that a "bad one" would not get by and have to be patched in the yard.

Decision

The evidence reflects that Cen-Vi-Ro was not directed to repair all air holes in the bells, but that the decision to coat the entire bell was Cen-Vi-Ro's, occasioned by a lack of qualified personnel to determine which holes required repair and which did not. The claim for repair of insignificant air holes is denied.

Elimination of Allowable Repairs

The assertion that the Bureau restricted repairs permissible under the contract is based on the contention that the Concrete Manual, Seventh Edition (Exh. 117), is incorporated into the contract and upon the May 13 letter, the May 24 memorandum and instructions and directives issued to pipe inspectors during the period April 30 to and including May 24, 1965. Our reasons for holding that the contracts contemplated that repairs in accordance with the Concrete Manual were permissible have previously been set forth and will not be repeated here. We have also quoted and referred to instructions issued to pipe inspec-

tors as of April 30 and May 7, 1965, and quoted verbatim the letter of May 13 and the memorandum of May 24, 1965.

As we have seen (note 35, *supra*), the language of the specification which Cen-Vi-Ro asserts incorporates the provisions of the Concrete Manual, Seventh Edition, into the contract is identical to that of DC-6000. It is also clear that Cen-Vi-Ro is complaining of the Bureau's refusal to permit repairs to non-cylinder prestress pipe, *e.g.*, longitudinal cracks, cracked or spalled spigots, allegedly permitted by the Manual as well as repairs to RCP pipes (Exh. 81K, p. C-12). However, it should be noted that the Manual contains an additional provision applicable to prestress pipe:

Repairs of prestressed pipe should be limited to repairs of imperfections in the bell or spigot or other defects that do not involve structural adequacy. (Subsection 141. (a) at p. 444.)²²¹

In view thereof and in view of the limited quantity of NCP pipe produced, we consider Cen-Vi-Ro's claims under this heading as having limited application to NCP pipe. However, unless otherwise indicated decisions on various types of defects upon which the Bureau allegedly refused to permit repairs, will be equally applicable to NCP pipe.

As noted above, manufacture of RCP pipe for DC-6130 commenced on or about February 1, 1965 (note 10, *supra*). By the end of March

²²¹ This provision clearly implies that repairs to other than prestress pipe are permissible notwithstanding that they involve structural adequacy of the pipe.

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1965, Cen-Vi-Ro had produced 2,874 of 18- through 24-inch diameter pipes of which only 144 had been accepted (memorandum from resident engineer, dated April 5, 1965, Exh. 17). During the May 15 inventory, 337 RCP pipes 18 through 27 inches in diameter were rejected under this contract (Exh. 94). It appears that this total includes 23 previously accepted pipes of which four had been repaired (App's Exh. B-3). However, it does not include 96 pipes marked for special hydro. There were a total of 1,078 final rejects of RCP pipes for all causes representing approximately 4.24 percent of the 25,416 pipes manufactured (Exh. 81Q). Ninety-three of these rejects are attributable to hydrostatic test failures without specifying a reason, such as longitudinal cracks, etc., for the failure.

Longitudinal Cracks

Subparagraph 77.j.(2) applicable to RCP and Subparagraph 79.j.(2) applicable to NCP required, *inter alia*, that the pipe be "free from fractures." However, we have accepted Mr. Peckworth's testimony that while all fractures are cracks, the converse is not true. Accordingly, Specification DC-6130, no less than Specifications DC-6000, cannot be construed as requiring that the pipe be free from all cracks.

The Concrete Manual, Seventh Edition provides (as does the Sixth) that fractures or cracks passing through the shell except those extending into or beyond the spigot

gasket area and more than four inches around the circumference under the gasket are normally repairable except where the defect is the result of a continuing failure to take known corrective action.

Mr. Lincoln testified that prior to May of 1965, the Bureau allowed cracks extending entirely through the shell to be repaired, but that after May 13, 1965, such repairs were not allowed because many of the repaired cracks leaked or extended on hydrostatic test and such repairs were not considered safe (Tr. 1882, 1883). As we have seen in connection with the claims on DC-6000, Cen-Vi-Ro's expert witnesses, Dr. Davis and Mr. Peckworth, were in agreement that all cracks in concrete pipe are not repairable. Nevertheless, the evidence establishes and we find that the Bureau, after May 13, 1965, did not permit repairs to pipes with longitudinal cracks which are normally repairable in accordance with the Concrete Manual.

The evidence does not indicate that longitudinal cracks were a significant problem in pipes produced under DC-6130 prior to May 15, 1965, since of 5,898 pipes manufactured (Exh. 81Q) only one was rejected for longitudinal cracks prior to the May 15 inventory (Pipe Units Rejected Prior to Inventory of May 15, 1965, Exh. 94). An additional 14 pipes were rejected for longitudinal cracks during the May 15 inventory. The record does not indicate whether any of the 23 previously accepted pipes (four of which

had been repaired) which were rejected during the May 15 inventory had longitudinal cracks. There were 129 final rejects for longitudinal cracks of which 24 were manufactured prior to May 15, 1965 (Exh. 81R).

The May 15 inventory was conducted in accordance with the May 13 letter which provided that all pipes cracked longitudinally for substantially the full length of the pipe would be rejected and that all pipes containing shorter longitudinal cracks must be hydrostatically tested. It is not clear that the definition of substantially as over one half of the length of the pipe (memorandum of March 31, 1966, note 29, *supra*) was applied to pipes produced under DC-6130. Mr. Dess Chappelear, Bureau engineer in charge of pipe laying under DC-6130, testified that the criterion used by inspection personnel in the field (laying site) was any crack visible on both the inside and outside of the pipe (*i.e.*, the "crack extended through the barrel [wall] of the pipe") was cause for rejection (Tr. 405; memorandum written by Mr. Chappelear, dated May 22, 1967, Exh. 89). The memorandum states that longitudinal cracks occurring at the spigot were cause for rejection if the crack reached into or crossed the spigot gasket groove. Mr. Chappelear testified that the foregoing criteria were developed by the project construction engineer and the resident engineer at Plainview who were responsible for inspection of pipe at the place of

manufacture (Tr. 410). The record indicates that the Bureau strove to coordinate inspection efforts at the plant and at the laying site so that criteria for repair and rejection were essentially the same (Inspectors Daily Report, dated August 4, 1965, Exh. 100). We so find.

Mr. Chappelear's memorandum (Exh. 89) states that four pipes which met the field criteria for rejection were hydrostatically tested at Cen-Vi-Ro's plant on July 15, 1966, and that all four split before the specified test pressure was reached. One additional pipe which was rejected by R. H. Fulton for a longitudinal crack at the spigot, but which was not rejectable under the Bureau's criteria, attained the required test pressure. Attached to the memorandum of May 22, 1967, was a list of fifty 27-inch pipes rejected in the field by Bureau personnel of which 16 were rejected for longitudinal spigot cracks and one for a longitudinal crack at the bell. The length and extent of the cracks on these pipes are not stated. The memorandum states that difficulties were primarily confined to 27-inch pipes,²²² that the quality of other sizes of pipe was good and that less

²²² An Inspectors Daily Report for the period January 14 through 18, 1966, quotes Mr. Herrera as saying that if the problem of longitudinal cracks can't be solved soon, Cen-Vi-Ro would be forced to subcontract to GHA (Gifford-Hill-American) manufacture of the 27-inch A100 and B100 pipes. The report indicates that Mr. Herrera attributed longitudinal cracks to cages. It appears that Cen-Vi-Ro actually subcontracted 21,996 feet of 27-inch A100 and B100 RCP pipes to Gifford-Hill-American (Exh. 81K, p. F-13) out of a total requirement for such size and classes of 64,850 feet (Exh. 79).

than six pipes of all other sizes were rejected by the Bureau in the field. However, an undetermined number of pipes broken in transit, unloading, etc. were rejected by R. H. Fulton prior to field inspection by the Bureau. Mr. Chappelcar testified that the factual statements in the memorandum were correct (Tr. 403).

A memorandum, dated March 23, 1966, written by Mr. Herrera (Cen-Vi-Ro Correspondence) reflects the results of special hydrotests on March 22, 1966, of four 27-inch by 16-foot pipes which were tested because Bureau inspectors in the field questioned the soundness of the seams. These pipes were manufactured on December 22, 1965, as 27-inch B100 and downgraded on lot testing to B75. Although the pipes did not leak at the seams, two joints developed longitudinal cracks at 75-foot head and one developed a crack at 50-foot head. These pipes were not pre-soaked. Four additional pipes from the same lot (December 20 to 22, 1965)²²³ were tested after presoaking on March 23, 1966, with the result that two of the pipes developed small longitudinal cracks at ten p.s.i. and two developed full length longitudinal cracks at 75-foot head. Photos of what appear to be 27-inch pipes being water cured are in the record (p. 22, Vol. III, Exh. 40). These pipes were manufactured during the period Decem-

ber 20 to December 22, 1965, and are stated to have developed longitudinal cracks when subjected to hydrostatic tests. The memorandum states that the Bureau marked 146 pipes from the above lot for special hydro even though the pipes had previously been accepted. Results of these tests, if conducted, do not appear in the record. The memorandum indicates that on December 22, 1965, the plant ran out of aggregate and that poor material may have been used.

The resident engineer's memorandum of May 24, 1965, provided that all pipes cracked longitudinally for substantially the full length of the pipe were to be hydrostatically tested before any repairs were made and that pipes with short longitudinal cracks which were repaired prior to May 13, 1965, were to be hydrostatically tested without additional repair work.²²⁴ Pipes which failed the test were rejected while those that passed the test were accepted without additional repair work. During the May 15 inventory 96 pipes were marked for special hydrostatic tests. The evidence does not indicate how many of these were so marked because of longitudinal cracks. It appears that 99 RCP pipes (27 inches and below in di-

²²³ This indicates that the reduced lot test period which was effected on or about May 10, 1965, was still in effect for DC-6130 pipes. Cen-Vi-Ro has not objected to the reduction of the lot test period under this contract.

²²⁴ As we have seen, this was modified after September 1, 1965, to the extent that pipes with not more than two longitudinal cracks in other than bell or spigot gasket areas which did not exceed two feet in length and which did not extend under pressure were acceptable with repair and without rehydro (note 131, *supra*). The record does not indicate the number of such pipes.

ameter) were subjected to special hydrostatic tests for longitudinal cracks of which 51 resulted in failure (Summary of Special Hydrostatic Testing, Exh. 81T). It should be noted, however, that there is considerable evidence that pipes which failed the test were listed under the condition under which the pipe failed which was not necessarily the reason for the test (note 173, *supra*).

Cen-Vi-Ro alleges that longitudinal cracks were cause for rejection even though it repeatedly demonstrated that these cracks could be successfully repaired (Exh. 81K, p. C-3). Cen-Vi-Ro also asserts that pipes subjected to hydrostatic tests were rendered useless by the tests. While there is no direct evidence that Cen-Vi-Ro in fact accomplished satisfactory repairs to pipes with longitudinal cracks²²⁵ the Government having refused to permit repairs allowed by the contract is hardly in a position to complain. Summary of the Special Hydrostatic Tests (Exh. 81T) indicates that 20 pipes which initially failed hydrostatic tests were repaired and retested and that all failed. There is no indication of the reason for the failures. Of the 51 pipes which failed special hydrostatic tests be-

cause of longitudinal cracks, eight are 18-inch by 12-foot, eight are 21-inch by 12-foot, ten are 24-inch by 12-foot, one is 27-inch by 12-foot, 23 are 27-inch by 16-foot and the diameter of the remaining pipe is not shown by the record. In the nature of a jury verdict, we conclude that three of the 18-inch pipes, two of the 21-inch pipes, three of the 24-inch pipes and seven of the 27-inch by 16-foot pipes would have passed the test and have been acceptable pipe if repairs had been permitted prior to testing.

Other than the indication that Mr. Herrera attributed longitudinal cracks in high head RCP pipe to cages and that some longitudinal cracks which developed on hydrostatic tests may have been attributable to poor or dirty aggregate, the record does not indicate the cause or causes of longitudinal cracks. In any event, the fact that there were only 24 pipes finally rejected for longitudinal cracks out of 5,898 pipes produced prior to May 15, 1965, precludes a finding that Cen-Vi-Ro failed to take known corrective action to eliminate such cracks prior to May 15, 1965.

Decision

The contract required that the pipes be free from fractures. However, fractures and cracks are not identical and the contract may not be construed as prohibiting all cracks in the pipe. The contract contemplated that repairs in accordance with the Seventh Edition of the Concrete Manual were permissible.

²²⁵ An Inspectors Daily Report, dated July 16, 1965 (Exh. 100), states that Cen-Vi-Ro was allowed on a trial basis to repair NCP Cores with longitudinal cracks less than two feet long which did not extend through the wall and did not extend into the gasket area or bell or spigot. The record does not indicate whether any such repairs were successfully accomplished. However, an Inspectors Daily Report, dated August 13, 1965 (Exh. 100), quotes Mr. Hubbard as stating that Cen-Vi-Ro would reject a great number of the remaining NCP pipe cores rather than attempting their repair.

The Concrete Manual provides that fractures or cracks passing through the shell, except those extending into or beyond spigot gasket bearing areas and more than four inches around the circumference under the gasket, are normally repairable except where the defect is attributable to a continuing failure to take known corrective action. Nevertheless, it is clear that not all longitudinal cracks other than those extending more than four inches in spigot gasket area are repairable and Cen-Vi-Ro does not contend otherwise.

After May 13, 1965, the Bureau did not allow the repair of any cracks which extended through the shell of the pipe. This was clearly a restriction on repairs which were normally permissible in accordance with the Concrete Manual. Pipes with shorter longitudinal cracks or which had been repaired prior to May 13, were required to be hydrostatically tested prior to any repairs being effected. Since the contract may not be construed as prohibiting all cracks in the pipe, the requirement that all pipes with short longitudinal cracks be hydrostatically tested appears to be a clear instance of the substitution of hydrostatic tests for a visual determination of whether the pipes were acceptable. The requirement that all pipes with longitudinal cracks which had previously been repaired be hydrostatically tested is contrary to the Manual which provides for hydrostatic tests on each pipe upon which major repairs have been effected, for tests on occasional pipes

having lesser repairs capable of affecting performance of the pipe and for tests on representative units of cracked but unshattered pipes.

There were only 24 final rejects for longitudinal cracks out of 5,898 pipes produced prior to May 15, 1965. The record does not establish the cause or causes of longitudinal cracks. Accordingly, the Government's contention that restrictions on the repair of longitudinal cracks were justified by Cen-Vi-Ro's continuing failure to take known corrective action is untenable and is rejected.

There were 129 final rejects for longitudinal cracks. Ninety-nine pipes were subjected to special hydrostatic tests for longitudinal cracks of which 51 resulted in failure. It is not possible to determine how many of these pipes would have passed the test and been acceptable pipes if repairs permitted by the Concrete Manual had been allowed prior to conducting the tests. However, the Government is not in a position to complain since its actions have made the evidence unavailable. In the nature of a jury verdict, we determine that fifteen pipes (three 18-inch, two 21-inch, three 24-inch and seven 27-inch by 16-foot pipes) would have passed the test and been acceptable pipes if repairs permitted by the Concrete Manual had been allowed prior to hydrostatic testing. We find that these pipes were improperly rejected.

The appeal as to longitudinal cracks is sustained as to these pipes.

Cen-Vi-Ro is entitled to an equitable adjustment measured by the cost of producing these pipes less the cost of repair. The amount of the equitable adjustment is determined *infra*.

Defects in Bell and Spigot Areas

This heading includes 668 RCP pipes rejected for impact damaged bells, rocky bells, circumferentially cracked bells, broken spigots and circumferentially cracked spigots (Exh. 81Q). The contracting officer found that an additional 35 NCP pipes were rejected for bell and spigot defects (par. 43, Findings of Fact). This finding is supported by a summary attached to an Inspectors Daily Report, dated September 1, 1965, Exh. 100.

Subparagraph 77.e.(3) applicable to RCP (79.d.(3) applicable to NCP) provides in part: "Where one of the centrifugal spinning methods is utilized, sufficient concrete shall be placed in the forms during charging operations to insure pipe of the specified wall thickness and with a minimum variation in wall thickness and pipe diameter throughout the length of the pipe. The duration and speed of spinning shall be sufficient to completely distribute and thoroughly consolidate the concrete and produce an even interior surface."

We have quoted *ante* in connection with the claim for repair of insignificant air holes the provisions of the specifications providing that surfaces of bell and spigot in contact with the gasket within a joint

movement range of three-fourths of an inch shall be free from defects except that individual air holes may be repaired. Cen-Vi-Ro asserts that it was severely restricted on the type and size of repairs that could be made on the pipes contrary to the Seventh Edition of the Concrete Manual (Exh. 81K, p. C-3). As to NCP pipes, Cen-Vi-Ro asserts that repairs to the pipe ends were limited to insignificant touching up and that any repairs encroaching on the gasket bearing area were generally forbidden.

Instructions to inspectors on April 30, 1965, precluded the repair of fallouts in excess of one square foot in area²²⁰ and rocky bells in excess of six inches in the gasket area (Inspectors Daily Report, dated April 30, 1965, Exh. 100). The Tentative Instructions to Concrete Pipe Inspectors of May 7, 1965, repeated the above instructions and applied the six-inch criterion to damage in the spigot gasket bearing area. This was an apparent relaxation of repairs permitted by the Manual since breaks entirely through the shell and into or beyond spigot gasket bearing area which extend for more than four inches around the circumference are not normally repairable. The May 13, 1965, letter from the project en-

²²⁰ The pipes under consideration here are 18 through 27 inches in diameter. Dr. Davis testified that fallouts normally would expose reinforcing steel. Since the manual allows repair of exposed steel only on the inside of pipes 36 inches or larger in diameter, the Bureau does not appear to have been obligated to allow repair of any fallouts on small diameter pipes. Cen-Vi-Ro is not contesting the propriety of 39 final rejections for fallouts.

gineer (Exh. 81C) provided that pipes having imperfections or damaged areas that extend over six inches in gasket area in bell and over four inches in the spigot would be rejected. The letter also provided that extensive repairs to rock pockets in bells and lack of consolidation of the concrete that will result in poor bond between the concrete and the steel would not be permitted.

The contracting officer found that in the early stages of the work the Bureau permitted extensive repairs to defects in bell and spigot areas, but that this "concession" was withdrawn when it was found that such repairs impaired the function of the joints (par. 44, Findings of Fact). As we have found in connection with claims under DC-6000, the evidence supporting this finding consists of Mr. Rippon's testimony that repairs to bells and spigots on other contracts which were not within specification tolerances resulted in leaking joints and testimony of the resident engineer concerning reports to the effect the laying contractor experienced difficulty in joining pipes with rough bells. Although the letter from R. H. Fulton to Cen-Vi-Ro, dated October 7, 1965 (Exh. 26), indicates that the quality of the bells on Cen-Vi-Ro pipes was marginal, no testimony with respect thereto was offered at the hearing even though the author of the letter, Mr. Robert L. Dragoo, did testify and there is evidence that laying difficulties may have been attributable to practices of R. H. Fulton's laying crews (note 135, *supra*). The

evidence reflects that hydrostatic test results on joints (joinder of two pipes) under DC-6000 were satisfactory and there is no evidence that such tests on DC-6130 pipes were not also satisfactory.

There were 94 rejects for bell and spigot defects prior to the May 15 inventory (Exh. 94). During the May 15 inventory 198 pipes were rejected for rocky or damaged bells or spigots. Although rejects for bell and spigot defects on this tabulation are not further broken down into pipes rejected for rocky bells, broken or impact damage to bells and spigots, etc., there can be little doubt that the majority were rejected for rocky bells, impact damage to or broken bells.

Impact damage over less than 45° of bells is normally repairable in accordance with the Concrete Manual. Since 45° on the bell of an 18-inch diameter pipe is 7.65 inches (approximately 10.6 inches on a 27-inch pipe), there can be no doubt that restricting repairs on bells to defects of six inches or less restricted repairs of impact damage normally permissible in accordance with the Concrete Manual. There is no evidence that this restriction on the repair of impact damaged bells was ever relaxed. There is no provision of the Concrete Manual which specifically allows the repair of broken or impact damaged spigots. There were 68 final rejects for impact damaged bells and 196 final rejects for broken spigots (Exh. 81R.). Forty-four of the final rejects for impact damaged bells and

149 of the final rejects for impact damaged spigots were manufactured subsequent to May 15, 1965.

There were 15 special hydrostatic tests for impact damage of which seven resulted in failure (Exh. 81T). The record does not indicate whether these tests were for damaged spigots or damaged bells. In view thereof and in view of the fact damaged spigots where the break is entirely through the shell and extends for more than four inches under the gasket is not normally repairable under the Concrete Manual, we conclude there is no basis for utilizing a jury verdict to determine how many would have passed the test and been acceptable pipes, if repairs were permitted prior to testing.

We have assumed that rocky bells on large diameter pipes are normally repairable under the Concrete Manual as rock pockets, exposed steel and/or roughness in the gasket bearing surfaces of the bells. The reasons for finding rocky bells repairable on larger size pipes are, with the exception of repairs to exposed steel, equally applicable to pipes 18 through 27 inches in diameter.²²⁷ Although the Manual does not limit the repair of defects in the above categories by size or area, we think it clear that all rocky bells are not repairable without regard to extent. Since impact damage extending up to 45° of circumfer-

ence of bell is normally repairable under the Manual, it would seem reasonable that rocky bells of at least that magnitude are also repairable. Accordingly, the May 13 letter precluding repair of imperfections in excess of six inches in bell areas constituted a restriction on repairs of rocky bells the extent of which varied in accordance with the size of the pipe. In August 1965 the Bureau relaxed this restriction and permitted the repair of rocky bells (18 through 27 inches in diameter) without regard to size provided the defective concrete did not extend to reinforcing steel when chipped out for repair (Inspectors Daily Report, dated August 4, 1965). Exposed steel on the inside of pipes below 36 inches in diameter is not normally repairable under the Concrete Manual and the limitation that defective concrete not extend to reinforcing steel was not contrary to the Manual. There were 250 final rejects for rocky bells of which 150 were manufactured after May 15, 1965 (Exh. 81R.). This indicates either that Cen-Vi-Ro did not choose to repair all such pipes or that the defective concrete extended to the reinforcing steel when chipped out for repair (note 137, *supra*). Special hydrostatic tests do not appear to have been required on pipes with repairs to rocky bells.

Sixty-one pipes were rejected for circumferential cracks prior to May 15, 1965 (Exh. 94). An additional 42 pipes were rejected for this reason during the May 15 inventory.

²²⁷ The Reject Certifications (Exh. 121), reflect that Cen-Vi-Ro's most frequent disagreement over the rejection of pipes was whether rocky bells were repairable. In other respects, Cen-Vi-Ro representatives agreed that the rejections were proper in almost all instances.

There were 123 final rejects for circumferentially cracked spigots of which 92 were manufactured after May 15, 1965, and 31 final rejects for circumferentially cracked bells of which 11 were manufactured after May 15, 1965 (Exh. 81R). Cen-Vi-Ro admits that circumferential cracks in the spigot occur almost entirely during stripping of the form (Exh. 81K, p. C-8). The cause of circumferential cracks in the bell does not appear from the record. The May 13 letter restricted repair of imperfections or damaged areas in gasket areas of bell to six inches or less and to spigots of four inches or less. It also provided that all pipes with circumferential cracks extending through the pipe wall would be rejected. The Manual permits the repair of fractures or cracks passing through the shell except for breaks entirely through the shell in spigot gasket area which extend more than four inches around the circumference under the gasket. We think it clear that the May 13 letter restricted repairs to circumferential cracks which were normally permissible under the Manual. Indeed, as we have seen, the purpose of the letter was to limit repairs. However, Cen-Vi-Ro does not contend that all pipes with circumferentially cracked spigots are repairable. Although Cen-Vi-Ro asserts that it repeatedly demonstrated that pipes with circumferentially cracked spigots and broken or cracked bells could be successfully repaired, there is no probative evidence to support this assertion.

Special hydrostatic tests which were conducted on pipes with circumferential cracks in the spigot are lumped in with tests on pipes with fallouts or bad interiors, etc. (Exh. 81T). We conclude that there is no basis for applying a jury verdict to determine the number which would have been acceptable pipes if repairs in accordance with the Concrete Manual had been permitted prior to conducting the tests.

The record would not support a finding that Cen-Vi-Ro continually failed to take known corrective action to reduce or eliminate bell or spigot defects.

The only evidence of repairable pipes being improperly rejected is Mr. Peckworth's off-hand estimate that 50 percent of the pipes he observed at the time of his visit to Cen-Vi-Ro's plant in January of 1967 should have been accepted or repaired. It is not clear that Mr. Peckworth examined any pipes of less than 54 inches in diameter. In any event, we have found that his testimony is lacking in specificity and too general to be substantial probative value.

Decision

We have found that instructions issued to Bureau inspectors on April 30, 1965, May 7, 1965, and the letter of May 13, 1965, constituted restrictions on repairs permitted by the Concrete Manual to impact damaged bells, rocky bells and circumferentially cracked bells. To a much more limited extent, these instructions and directives restricted re-

pairs to circumferentially cracked spigots which are normally repairable in accordance with the Concrete Manual. Repairs were also restricted on damaged spigots where the damaged area exceeded four inches in length irrespective of whether the break was entirely through the shell. Repairs to damaged spigot gasket areas which extend entirely through the shell and more than four inches around circumference under the gasket are not normally repairable under the Manual.

The restriction on the repair of rocky bells was subsequently relaxed in that rocky bells were repairable without regard to size provided the defective concrete did not extend to reinforcing steel when chipped out for repair. This proviso was not contrary to the Concrete Manual. The other restrictions on repairs permitted by the Concrete Manual were not relaxed.

Notwithstanding the above findings, it is clear that not all of the listed defects are repairable without regard to severity. The Concrete Manual limits repairs of impact damaged bells to those extending less than 45° of circumference. The Concrete Manual does not permit, and Cen-Vi-Ro does not contend, that all circumferential cracks in spigots and bells are properly repairable. The evidence does not support Cen-Vi-Ro's assertion that it repeatedly demonstrated that pipes with circumferentially cracked spigots or broken or cracked spigots could be successfully repaired.

There is no probative evidence that any of the pipes finally rejected by the Bureau were properly repairable in accordance with the Concrete Manual.

The appeal as to bell and spigot defects is denied.

Testing Criteria

The provisions of Specifications DC-6130 involving testing of RCP pipes (Subparagraph 77.i) are identical to DC-6000 in that hydrostatic tests are required on one percent, but not less than one pipe unit of each size and class of pipe, and joint tests are required on one half percent, but not less than one joint of each size and class of pipe. The pipe is required to withstand a pressure of 120 percent of the design internal pressure for 20 minutes without cracking and without leakage appearing on the exterior surface. Provisions regarding the lot-test period and the contractor's right to have two additional pipes tested if the pipe selected as representative of the lot failed the test are identical to the provisions of DC-6000. However, the final sentence of Subparagraph 77.i.(2) differed from the corresponding section of DC-6000 as originally written:

When slow forming beads of water result in minor dripping, the pressure may be released and the pipe unit may be retested within 1 week and if no dripping is evident during the retest, the pipe unit may be accepted for use.

In addition, the final sentence of paragraph 72 entitled *Pipe, General* (note 38, *supra*) provides:

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Pipe that has been repaired shall be subject to the designated hydrostatic and/or load tests in accordance with these specifications, and these tests, where required, shall be in addition to the standard tests required by the several paragraphs for pipe.

The preface to the Seventh Edition of the Concrete Manual contains language indicating that where the Manual is referred to in the specification, it has the full effect of a specification. While it does not appear that "these specifications" in the quoted sentence refers to or includes the Manual, we consider it would be reasonable to determine "where required" by reference to the Concrete Manual.

As we have seen, each unit of NCP pipe was required to withstand a pressure of 125 percent of the design head for four minutes without leakage or cracking.

Cen-Vi-Ro alleges that it was consistently held to a standard of pipe quality different from that required by the contract, that the Bureau refused to permit pipes to be repaired prior to testing and in effect, achieved additional depth in lot testing (Exh. 81K, p. C-1). Cen-Vi-Ro complains that many pipes were rejected without regard to lot-test results and that it was forced to resort to additional hydrostatic testing in order to obtain acceptance of the pipes. Cen-Vi-Ro asserts that it was not equipped to perform these additional tests inasmuch as they were not contemplated by the bid-

ding documents.²²⁸ Cen-Vi-Ro also complains that the Bureau had no one at the plant site with experience to judge if dripping pipes would heal and that pipes which dripped on the test stand were automatically rejected.²²⁹ Cen-Vi-Ro also alleges that Bureau representatives visually selected the lot test unit rather than utilizing random sampling techniques.

Cen-Vi-Ro alleges that there were 507 special hydrostatic tests of which 91 were on pipes repaired prior to testing. Thirty-five tests resulting from check test failures are also admitted to have been necessary (Exh. 81K, p. F-7). Cen-Vi-Ro claims compensation for conducting the remaining 381 allegedly unnecessary tests. Government figures indicate that there were a total of 517 special hydrostatic tests of which 283 passed and 234 or 45.3 percent failed (Summary of Special Hydrostatic Tests, Exh. 81T). Government figures also indicate that there were 569 lot tests of which 143 resulted in failure and 175 check tests of which 77 resulted

²²⁸ Subparagraph 77.1.(1) of the specifications provides in part:

"The contractor shall provide at his expense adequate equipment, and all labor and materials for making the tests on the pipe units." The evidence does not reflect the percentage of pipes Cen-Vi-Ro contemplated testing under this contract.

²²⁹ This contention appears to be without merit. As noted above, the language of DC-6130 differed from that of DC-6000 in that pipes which exhibited minor dripping on initial test could be retested within one week and accepted only if no dripping was evident on retest.

in failure (Summary Hydrostatic Testing DC-6130—RCP, Exh. 81S). Test results on individual pipes after check test failures are not given. Ninety-six pipes were marked for special hydro under DC-6130 during the May 15 inventory (App's Exh. B-3). Results of tests on these pipes are not shown by the record.

The origin of the practice of conducting special hydrostatic tests has been recited above in connection with the claims on DC-6000 and will not be repeated here. Suffice it to say that the evidence establishes that Cen-Vi-Ro in the early stages of production joined in initiating the practice to prove the competence of otherwise doubtful pipes, that Cen-Vi-Ro personnel at times marked pipes for special hydrostatic tests,²³⁰ that Cen-Vi-Ro recognized that pipes selected for special hydrostatic tests were of questionable acceptability in its letters requesting reduction or elimination of the soak period for special hydro pipes under DC-6000 and that the 45.3 percent rate of failures for special hydro pipe would appear to vindicate the Bureau's judgment as to the competence of a substantial portion of pipes selected for special hydros. Cen-Vi-Ro repeatedly protested orally the number of pipes selected for special hydro and the Bureau was clearly aware that Cen-Vi-Ro regarded many of the special hydrostatic tests as exces-

sive and unnecessary. Although the majority of these oral protests appear to have been confined to DC-6000 pipes, under the circumstances we conclude that they were sufficient to preserve Cen-Vi-Ro's claim to be compensated for any tests shown to be unreasonable under the instant contract.

Cen-Vi-Ro manufactured 25,416 RCP pipes, exclusive of 8-foot lengths, under DC-6130 of which 5,352 were downgraded on the basis of hydrostatic tests.²³¹ Of these, 4,959 were in classes A100 and B100 and 69 were in class C125. Cen-Vi-Ro has not even alleged that hydrostatic tests on these pipes were improperly conducted. The Board finds that Cen-Vi-Ro experienced great difficulty in manufacturing high-head RCP pipes which would successfully pass hydrostatic tests. Cen-Vi-Ro subcontracted manufacture of a substantial quantity of high-head 27-inch RCP pipes to Gifford-Hill-American (note 222, *supra*). The evidence does not reflect that Cen-Vi-Ro's difficulties in this respect can be attributed to actions of the Bureau.

Cen-Vi-Ro asserts that the results of special hydrostatic tests on pipes with longitudinal cracks, circumferentially cracked spigots and broken or cracked bells are distorted by the Bureau's refusal to

²³⁰ The Summary of Hydrostatic Testing (Exh. 81S) indicates 33 pipes were tested for CVR Quality Control of which 12 failed the test.

²³¹ Exh. S1S. In addition, at least 950 RCP pipes were utilized at a lower head than for which the pipes were accepted because of the lack of accepted pipes of the proper size and class required by the laying contractor (Inspectors Daily Reports, dated August 17 and September 1, 1965, Exh. 100).

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allow repairs permitted by the Manual to be accomplished prior to testing.²³² The contracting officer found that in general repairable imperfections with the exception of longitudinal and circumferential cracks were allowed to be repaired prior to testing.²³³ He determined that the reason repairs on pipes with longitudinal and circumferential cracks were not allowed prior to testing was concern that the repair might enable the pipes to pass the hydrostatic tests and yet conceal a serious structural weakness. We find that the evidence fully supports the above finding of the contracting officer as to the reason for the refusal to permit repairs prior to testing.

Although the Bureau's concern as to the adequacy of repairs to longitudinal and circumferential cracks is understandable, repairs permissible under the contract could not properly be refused upon the ground the repairs might not be adequate. The Concrete Manual provides for hydrostatic tests on each pipe upon which major repairs have been accomplished and for tests on occasional pipes having lesser repairs (Sec. 137, par. (h)) for the obvious purpose of testing

the efficacy of the repairs. In the nature of a jury verdict we have determined that 15 of the 51 pipes subjected to special hydrostatic tests for longitudinal cracks would have passed the test and would have been acceptable pipes if repairs had been permitted prior to testing. The number of special hydrostatic tests for circumferentially cracked spigots and broken or cracked bells is not shown by the record. In view thereof and since Cen-Vi-Ro has not proved its assertion that it repeatedly demonstrated that such defects could be successfully repaired, we conclude that the distortion of test results alleged by Cen-Vi-Ro has not been demonstrated. As to pipes which passed the test, the Bureau concluded that the defects were minor and accepted the pipes without repairs. Forty-eight of the pipes tested for longitudinal cracks and eight tested for circumferential cracks (apparently in the barrel) passed the test (Exh. 81T).

The only repairs permitted prior to testing under the memorandum of May 24, 1965, were to grout leakage at seams provided no cracks were evident after all defective concrete was removed and drummy areas of poor consolidation provided the drummy concrete could be removed by "shallow excavation." Shallow excavation as we have found was defined as between one-fourth and one inch in depth. The record reflects that Cen-Vi-Ro was permitted to repair with epoxy sand mortar approximately 247 pipes at the laying site having drummy

²³² Exh. 81K, p. C-3. In a memorandum, dated May 13, 1966 (Cen-Vi-Ro Correspondence), Mr. Herrera asserted that the practice of requiring special hydros prior to repairs was even abused by Cen-Vi-Ro personnel due to inefficiency.

²³³ Par. 58, Findings of Fact. Since the contracting officer had already determined that the Concrete Manual was not applicable and that the only repairs permitted by the contract were to air holes in bell surfaces, the meaning of "repairable imperfections" in this context is not clear.

areas which were predominantly at the form seam (Exh. 89). These pipes were accepted without hydrostatic testing. There were 11 special hydrostatic test failures for form seams out of 40 tested (Exh. 81T). However, there were only four pipes finally rejected for form seams (Exh. 81Q). There were seven failures for unconsolidated areas or rock pockets out of 19 tested (Exh. 81T). The record does not reveal the number of final rejects for rock pockets or unconsolidated areas. Since failures were listed under the condition under which the pipe failed irrespective of the reason for the test, it cannot be stated with certainty that form seams, rock pockets or unconsolidated areas were the reasons for these tests. Even if all of these pipes were repaired prior to testing, it would account for only 59 of the 91 repair tests Cen-Vi-Ro concedes were necessary.

There were 23 special hydrostatic test failures for slump cracks²³⁴ out of 138 tested, seven test failures for impact damage out of 15 tested, 34 test failures for miscellaneous reasons (which includes fallouts, bad interiors and cracked or pulled spigots) out of 97 tested and 72 pipes downgraded as a result of special hydrostatic tests (Exh. 81T). The caveat that the listed defects are not necessarily the reasons for the test is also applicable to these

failures. There is no evidence that these pipes were repaired prior to testing. However, since the memorandum of May 24, 1965, only permitted repairs of grout leakage at form seams and drummy areas of shallow excavation prior to testing, we conclude that it is unlikely that these pipes were repaired.

Cen-Vi-Ro's complaint that pipes were rejected without regard to lot test results is simply an objection to the criteria used by the Bureau in selecting pipes for special hydrostatic tests. We have detailed in connection with the claims on DC-6000 actions and statements of Bureau representatives indicative of a desire for a maximum amount of hydrostatic testing. We find that essentially the same attitude prevailed on RCP pipes under DC-6130. The Government asserts that special hydro pipe contained obvious defects and that the pipes were not representative of the lot from which the pipes were drawn. The position is supported, in part, by Mr. Thomas' testimony that special hydro pipes had obvious defects or were to test the efficacy of repairs (Tr. 1399, 1408). He also indicated that special hydros were required because the Bureau questioned the seriousness of the defect and to have another means of judging the extent of the defect (Tr. 1400, 1511, 1512). There is, of course, no doubt that pipes with defects normally repairable in accordance with the Concrete Manual could properly be rejected until the defects were satisfactorily repaired. However, it

²³⁴ Slump cracks are apparently caused by concrete slumping away from the form, but not sufficiently to cause a fallout. Thirty-nine final rejects are attributed to slump cracks (Exh. 81Q).

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would appear to be equally clear that the question of whether a particular defect was repairable was a judgment matter to be determined by visual examination and that to the extent the Bureau utilized hydrostatic tests as a substitute for such judgment, it required tests not contemplated by the contract. An example is the requirement that pipes with circumferential cracks be tested before repairs to determine "if crack extends through the pipe wall." (Memorandum of May 24, 1965, Exh. 5N, p. 17.) The evidence does not support the Government's contention that all pipes subjected to special hydrostatic tests contained defects sufficient to warrant their rejection.

The Government does not deny that selection of the lot test sample was not truly random until November of 1965. The Government does deny that the most questionable pipes were selected as the test sample. We have found one instance involving large diameter pipes where one of the apparently most questionable pipes was chosen for the test sample. Other than clear indications that one of the best pipes was not chosen for testing and other than Mr. Franklin's testimony that the lot test sample was arbitrarily selected, apparently from visual examination of all pipes in the lot, the record does not show the manner in which the Bureau selected the test sample. Mr. Franklin admitted that if the blind selection method resulted in choosing an obviously defective pipe, a different

pipe would be chosen for the test. This was an obvious benefit to Cen-Vi-Ro. Although the Bureau's sample selection method prior to November of 1965 may have resulted in additional lot test failures and, consequently, more check tests, we have no basis for determining that this was so for any particular number of pipes.

Decision

The contract required hydrostatic tests on one percent but not less than one pipe unit of each size and class of pipe. Through the Concrete Manual, it also provided for hydrostatic tests on each pipe unit upon which major repairs had been effected, for tests of occasional pipes having lesser repairs and for tests on representative units of cracked but unshattered pipes. Cen-Vi-Ro claims compensation for the cost of conducting 381 hydrostatic tests referred to as special hydros, which were allegedly not required by the contract.

The record establishes that there were 517 special hydrostatic tests. The Government contends that these tests were permitted to be performed at Cen-Vi-Ro's option on pipes which contained obvious defects for which the pipes could have been rejected or were for the purpose of testing repaired pipes. The Government relies on the 45.3 percent failure rate of pipes undergoing special hydros, which we accept as prima facie valid, as proof of substandard pipe manufactured

by Cen-Vi-Ro, Cen-Vi-Ro concedes that 91 tests on repaired pipes and 35 check tests (tests after failure of the lot test sample) were necessary.

The evidence does not support the Government's contention that all pipes subjected to special hydrostatic tests contained defects sufficient to justify their rejection or that the tests were justified as tests of repaired areas. In deciding similar claims under DC-6000, we have concluded that Cen-Vi-Ro's entitlement to compensation may properly follow the results of the tests (note 183, *supra*). We find that Cen-Vi-Ro is entitled to be compensated for the cost of conducting 283 special hydrostatic tests.

As to Cen-Vi-Ro's complaint that the method of selecting the test sample was not random, we note that it has been held that a change in the method of selecting a test sample did not entitle the contractor to a price adjustment for the cost of correcting an increased amount of rejects.²³⁵

The appeal as to "testing criteria" is sustained as to 283 special hydrostatic tests and is otherwise denied. The amount of the equitable adjustment is determined *infra*.

Changing Criteria for Pipe Acceptance

In pressing this aspect of its claims, Cen-Vi-Ro relies on the May 13 letter, the May 15 inventory and the memorandum of May 24, 1965. Cen-Vi-Ro alleges that 500 previ-

ously rejected pipes were ultimately accepted.²³⁶ Although not specifically stated, the claim, as is the similar claim under DC-6000, is founded upon the contention that acceptance of pipes after May 13, 1965, was based upon more stringent specifications.

The Government does not deny that pipe acceptance criteria were changed. Indeed, the contracting officer found that criteria for pipe acceptance were changed and that more stringent pipe acceptance criteria were applied after May 13, 1965, than previously (Pars. 61 and 62, Findings of Fact). However, he determined that no compensable change resulted in that the Bureau prior to May 13, 1965, had accepted pipes not meeting specification requirements.²³⁷ He also found that the Bureau waived or relaxed specification requirements prior to May 13, 1965, accepted pipes not complying with specification requirements after May 13, 1965, and that the May 13 letter was to Cen-Vi-Ro's benefit since the quality of the pipes improved thereafter.

The evidence reflects that 3,385 RCP pipes produced under DC-6130 were accepted prior to May 15, 1965 (Analysis of the State of RCP Production Just Prior to Bureau's

²³⁶ A "flier," dated November 29, 1965 (Exh. 28), issued by Cen-Vi-Ro advertising the sale of reject pipe, contains a total of 1,274 RCP pipes, 18 through 27 inches in diameter. Since there were a total of 1,078 final rejects of these sizes of pipes, it is evident that a minimum of 196 pipes which were rejected at that time must have been subsequently accepted.

²³⁷ The stated reason for this action was Bureau recognition that some time would necessarily elapse before pipes of consistent quality were produced on a regular basis.

²³⁵ *Temco, Inc.*, ASBCA No. 9558 (April 23, 1965), 65-1 BCA par. 4822.

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May 15 Inventory, Exh. 133, p. 3). The record does not establish that any of these pipes did not comply with specifications. The record also does not support the finding that the Bureau waived specification requirements under DC-6130 prior to May 13, 1965.

The Bureau's admitted purpose in issuing the May 13 letter and similar directives during the period April 30 to and including May 24, 1965, was to limit repairs and improve the quality of the pipe. We have found that the May 13 letter restricted repairs to rocky bells, impact damaged bells and longitudinal and circumferential cracks which were normally repairable in accordance with the Concrete Manual. Although the restrictions on the repair of rocky bells were subsequently relaxed, the other restrictions remained in effect throughout the remainder of pipe production. However, the evidence does not establish that any of the pipes finally rejected other than those for which we have sustained the appeal should have been accepted.

The evidence does establish that the Bureau waived certain requirements of the specifications after May 13, 1965. For example, the Bureau waived the soak period for all RCP pipes at Cen-Vi-Ro's option after May 19, 1965.²³⁸ It also appears that the Bureau did not re-

quire pipes exhibiting minor dripping to be retested within one week. The Bureau did not require repairs to pipes having drummy or unconsolidated areas less than one-quarter inch in depth. In addition, 45 NCP pipes with broken pretension rods or end anchorage failures (Exh. 81V) were accepted. The maximum allowable period between wire wrapping of NCP pipe cores and application of mortar encasement in instances of necessary repairs to secondary spigot gasket groove was extended from 16 hours to one day (Inspectors Daily Reports, dated July 13 and 16, 1965 (Exh. 100)). The contracting officer made no findings as to the extent of the savings, if any, due the Government and no evidence of such savings was offered at the hearing.

Decision

The record establishes and the Bureau admits that pipe acceptance criteria were changed after May 13, 1965, from the criteria prevailing prior to that date. It is also clear and the Government admits that acceptance criteria enforced after May 13, 1965, were more stringent than the criteria prevailing previously. Although the evidence does not support the Government's contention that non-specification pipes were accepted prior to May 13, 1965, it also does not support Cen-Vi-Ro's assertion that pipes in addition to those for which we have sustained the appeal which should have been accepted were rejected. Cen-Vi-Ro has failed to sustain its

²³⁸ There is no evidence that the reduction in the soak period from 3 to 1½ hours for special hydro pipe which was in effect for the period December 30, 1964, to May 19, 1965, was applicable to pipes manufactured under DC-6130.

burden of proof that it is entitled to compensation in addition to that as to which we have sustained the appeal.

The Government has had ample time to assert and prove any claims for savings allegedly attributable to specification waivers but has failed to do so.

The appeal as to "changing criteria for pipe acceptance" is denied except to the extent herein before indicated.

Equitable Adjustment

Since we have denied for lack of proof the principal portion of Cen-Vi-Ro's claims under this contract, it will not be necessary to deal extensively with its cost presentation.

Based on total man-hours for both contracts of 1,097,667 and total payroll, including taxes and insurance of \$2,221,728, Cen-Vi-Ro determined an average man-hour cost of \$2.024 (Exh. 81K, p. F-3). We accepted this figure under DC-6000 and accept it here. Plant and equipment support costs for the entire plant were determined to be \$2.29 per man-hour (Exh. 81K, p. F-4). We reduced the total of such costs (\$2,508,480) by \$213,621 representing "interest on investment" which which did not appear to be a cost. Elimination of this item had the effect of reducing plant and equipment support costs to \$2.09 per man-hour. In computing plant and equipment support costs in its claim for excess testing and repairs, Cen-Vi-Ro used a factor of 25 percent of the total of such costs. With the

deduction noted, plant and equipment support costs for testing equal \$.52 per man-hour which we accept as reasonable. We have also accepted as reasonable Cen-Vi-Ro's "adder" of \$.24 per man-hour for small tools and supplies.

As was the case under DC-6000, Cen-Vi-Ro's test equipment under DC-6130 was such that two pipes were ordinarily tested at one time. Cen-Vi-Ro alleges that a crew consisting of one foreman, two laborers and a forklift operator could on the average test two pipes every $2\frac{1}{2}$ hours (Exh. 81K, p. F-7). We accept this figure as reasonable. Since we have sustained the appeal as to 283 special hydrostatic tests, the amount due, exclusive of indirect job costs, is computed as follows: $283 \times 5 \text{ man-hours } (4 \times 1\frac{1}{4}) \times \$2.784 \text{ cost per man-hour } (\$2.024 + \$.24 + \$.52) = \$3,939.36$. Indirect job costs, overhead and profit are considered *infra*.

Excess Rejects

We have sustained the appeal as to 15 RCP pipes (three 18-inch, two 21-inch, three 24-inch and seven 27-inch) which we have determined were improperly rejected for longitudinal cracks. The 27-inch pipes are 16 feet in length while the balance are 12 feet long. The 18-inch pipes weigh approximately 1.2 tons each, the 21-inch pipes weigh approximately 1.4 tons each, the 24-inch pipes weigh approximately 1.6 tons each, and the 27-inch pipes weigh approximately 4.4 tons each (Exh. 28). Using these weights we

calculate the weight of the wrongfully rejected pipes as 42 tons.²³⁹

In computing this portion of its claim, Cen-Vi-Ro subtracted tons of pipe accepted by the Bureau (43,458) from total tons produced (48,644) including 42-inch pipes, and operated on the premise that 50 percent of the difference (2,593 tons) was salvageable pipe (Exh. 81K, pp. F-26 to F-30). Labor costs to produce this tonnage were computed on the basis of man-hours to batch, spin and strip which are asserted to be 2.855 man-hours per ton (Exh. 81K, p. F-2). This figure was applied to the allegedly wrongfully rejected tonnage times labor and equipment support costs totaling \$5.424 (labor of \$2.024 per hour plus adders of \$2.29 for plant, \$.24 for small tools and \$.87 for indirect job costs).

In computing its claim under DC-6000, Cen-Vi-Ro determined an average of 2.44 man-hours to produce a ton of pipe which we accepted as reasonable. This figure compares favorably with 2.317 man-hours per ton developed by the Government based on labor hours as shown on submitted payrolls and total tonnage produced under both contracts (Exh. 150). Since the two plants were essentially operated to-

gether, we see no justification for adopting a different method for determining man-hours to produce a ton of pipe for the instant claims. We will utilize 2.44 man-hours as the average time required to produce a ton of pipe. Labor and associated plant and equipment costs exclusive of indirect job costs, to produce a ton of pipe are calculated as follows: $\$4.35 (\$2.024 + \$2.09 + \$.24) \times 2.44 = \$10.61$.

Material Costs

Steel usage was again computed as .0432 tons per ton of pipe which multiplied by the asserted cost of \$126.56 per ton equals \$5.47 per ton (Exh. 81K, p. F-29). Cement usage was computed as .7621 barrels per ton of concrete (.7292 barrels per ton of pipe), which multiplied by the asserted cost of \$3.99 per barrel equals \$2.91 per ton. Sand usage was computed at .2772 per ton of concrete (.2652 per ton of pipe) which multiplied by the asserted cost of \$2.57 equals \$.68. Coarse aggregate usage was computed at .5394 per ton of concrete (.5161 per ton of pipe) which times the asserted cost of \$3.37 per ton equals \$1.74. Adding a five percent factor for waste material costs total \$11.34 per ton. This figure plus labor and associated plant and equipment costs, exclusive of indirect job costs, applied to the rejected tonnage equals \$921.90. Cen-Vi-Ro allowed a credit of \$5 per ton as the estimated cost of repairs to allegedly wrongfully rejected pipes (Exh. 81K, p. F-29).

²³⁹ Applying these weights to the 25,416 18-through 27-inch pipes, exclusive of 8-foot lengths, produced by Cen-Vi-Ro (Exh. 81Q) gives a total of over 61,000 tons of pipes. Since Cen-Vi-Ro calculated actual production of only 48,644 tons, including 42-inch pipes (Exh. 81K, p. F-29), it is apparent that the listed weights considerably exceed the actual weights of the pipes. Therefore, use of these weights is favorable to Cen-Vi-Ro.

We accept this estimate as reasonable. The amount due for wrongfully rejected pipes, exclusive of indirect job costs, is determined to be \$711.90.

*Indirect Job Costs, Overhead,
and Profit*

As pointed out in connection with the claims on DC-6000, Cen-Vi-Ro has not been precise as to the costs included in indirect job costs. Contract DC-6130 contains an "Extras" clause identical to that quoted from DC-6000 (note 201, *supra*). Accordingly, we decline to accept the claim for indirect job costs as submitted. We have sustained the appeal as follows:

Excess testing	\$3,939.36
Wrongfully Rejected Pipes ..	711.90
	<hr/>
	\$4,651.26

Applying 15 percent to the above figure results in a total of \$5,348.95. Because of the provision of the "Extras" clause, no additional allowance for overhead and profit is proper. For reasons previously stated, Cen-Vi-Ro has not established entitlement to interest on the amount awarded.

Conclusion:

The claims relating to DC-6000 are sustained in the amount of \$218,180.83 and are otherwise denied.

The appeal as to DC-6130 is sustained in the amount of \$5,348.95,

and is otherwise dismissed or denied.

SPENCER T. NISSEN, *Member*.

WE CONCUR:

WILLIAM F. MCGRAW, *Chairman*.

SHERMAN P. KIMBALL, *Member*.

APPENDIX A

Specifications DC-6000

67. Concrete Pressure Pipe

a. General.—Pipe for the aqueduct shall be reinforced-concrete pressure pipe and shall be manufactured and tested in accordance with the provisions of this paragraph. The pipe may be circular or prebored as shown on the drawings.

b. Classes.—Concrete pipe manufactured to these specifications shall be for hydrostatic heads of 25, 50, 75, 100, and 125 feet measured to the center line of the pipe. Designs are provided for external loadings of 5, 10, 15, and 20 feet of earth over top of pipe, designated A, B, C, and D in Table 1. The typical nomenclature used herein for the various classes of pipe is as follows:

A-25=Concrete pressure pipe for 5-foot maximum cover and 25-foot maximum head.

B-50=Concrete pressure pipe for 10-foot maximum cover and 50-foot maximum head.

c. Basis of acceptance.—The acceptability of the pipe shall be de-

terminated by the results of hydrostatic pressure tests applied on units of pipe, by pipe joint leakage tests, by compressive strength of concrete in pipe as determined by test cylinders, and by inspection during or after manufacture to determine whether the pipe conforms to these specifications as to design and freedom from defects such as blisters and drummy areas or other evidence of excessive segregation of aggregate. Details of the physical test requirements are specified in Subparagraph *i*.

d. Materials.—

(1) Reinforced concrete.—The reinforced concrete shall consist of portland cement, sand and coarse aggregate, and water, in which steel has been embedded in such a manner that the steel and concrete act together.

(2) Cement.—Cement used in concrete pipe shall be in accordance with Paragraph 91.

(3) Admixtures.—All concrete in concrete pipe placed by the poured and vibrated method shall contain an air-entraining agent conforming to Paragraph 92. The amount of air-entraining agent used shall be such as will effect the entrainment of not more than 2 and $\frac{1}{2}$ percent of air, by volume, of concrete as discharged from the mixer. Calcium chloride shall not be used except as provided in Paragraph 92. Natural cement, slag cement, pozzolan or other admixtures shall not be added to the concrete without the written approval of the contracting officer.

(4) Steel reinforcement.—Rein-

forcement shall consist of steel wire conforming to ASTM Designation: A 82; of steel bars or rods conforming to Federal Specification QQ-S-632, Type 1 or 2, Grade C, or welded fabric conforming to ASTM Designation: A 185.

(5) Aggregate.—Sand and coarse aggregate for concrete pipe shall be in accordance with Paragraphs 94 and 95, except that other size separations and maximum size of coarse aggregate may be used. The maximum size of coarse aggregate for each size of pipe shall be the largest size the use of which is practicable from the standpoint of satisfactory placing of the concrete. Sand gradings as provided in ASTM Designation: C 33 will be permitted when necessary for a manufacturing process to produce uniform, high-quality pipe.

e. Concrete.—

(1) Mixture.—The aggregate shall be so graded and proportioned and thoroughly mixed with such proportions of cement and water as will produce a workable, uniform and homogenous concrete mixture of such quality that the pipe will conform to the test and design requirements of these specifications. Batching shall be by weighing. If concrete materials are weighed cumulatively, the cement shall be weighed before the other ingredients. The concrete ingredients shall be mixed in a rotating- or paddle-type batch mixer or other approved types. The concrete ingredients shall be mixed for not less than 1 and $\frac{1}{2}$ minutes after all the ingredients, ex-

cept the full amount of water, are in the mixer: *Provided*, That the mixing time may be reduced if, when determined in accordance with the provisions of Designation 26 of the Sixth Edition of the Bureau of Reclamation Concrete Manual, the unit weight of air-free mortar in samples taken from the first and last portions of the batch as discharged from the mixer does not vary more than 0.8 percent from the average of the two mortar weights, the average variability for six batches does not exceed 0.5 percent, and the weight of coarse aggregates per cubic foot does not vary more than 5.0 percent from the average of the two weights of coarse aggregates. The Government reserves the right to increase the mixing time when the charging and mixing operations fail to produce a concrete batch throughout which the ingredients are uniformly distributed and the consistency is uniform. The concrete, as discharged from the mixer, shall be uniform in composition and consistency throughout the mixed batch, and from batch to batch except where changes in composition or consistency are required. The slump of the concrete, after the concrete has been deposited but before it has been consolidated, shall not exceed 3 inches.

The concrete shall have a portland cement content of not less than 6 sacks (94 pounds each) per cubic yard of concrete. The average compressive strength of the concrete shall be sufficient to insure that the following requirements are met:

(a) Eighty percent of the test cylinders shall have a compressive strength at 28 days' age in excess of 4,500 pounds per square inch.

(b) The average strength of any five consecutive tests shall not be less than 4,140 pounds per square inch at 28 days' age.

(c) No test cylinders shall have a compressive strength at 28 days' age of less than 2,900 pounds per square inch.

Except as hereinafter provided, the compressive strength of test cylinders at 28 days' age shall be determined from 6- by 12-inch concrete cylinders made from the concrete used in making the pipe and prepared, cured, and tested in accordance with Designations 29 to 33, inclusive, of the Sixth Edition of the Bureau of Reclamation Concrete Manual. Use of 3- by 6-inch test cylinders will be permitted when the capacity of the testing machine will not accommodate 6- by 12-inch test cylinders and the maximum size aggregate is 1 inch or less: *Provided*, That strength correction for size of cylinder is made. If the concrete consistency is too stiff for compaction by rodding or internal vibration as described in Designation 29, external vibration performed simultaneously with direct compaction by a compacting hammer using the following alternate method will be permitted in cylinder fabrication:

* * * * *

(2) Forms.—The forms shall be of steel made with butt joints throughout and the surfaces of the forms adjacent to the pipe walls shall be smooth and true. All forms shall be sufficiently tight with suit-

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able gaskets provided at all form joints and gates to prevent leakage of mortar. The forms shall be braced and sufficiently stiff to withstand without detrimental deformation, all operations incident to the placement and compacting of concrete within the form. The form and end rings shall be so constructed that the pipe when manufactured will have circular and cylindrical inner surfaces, and so that they may be stripped from the pipe without damage to the pipe or to its surfaces. Forms shall be cleaned and oiled before each filling. Defective forms, end rings and gaskets shall be adequately repaired or discarded.

(3) Placement of concrete.—The transporting and placing of concrete shall be by methods that will prevent the separation of the concrete materials and the displacement of reinforcement steel in the forms. The placing shall be such as to insure satisfactory bond between the concrete and steel. The concrete in the pipe shall be placed by centrifugally spinning, rolling, vibrating, by a combination of these, or by other approved methods. For concrete pipe that is manufactured by the placing and vibrating methods, the concrete shall be thoroughly consolidated by vibration until it is free from pockets, closes snugly against all surfaces, and is in complete contact with all reinforcement. Form vibrators, rigidly attached to the forms by bolting or clamping, shall be adequate in size and of sufficient frequency to properly consolidate the volume of con-

crete and shall be maintained in good operating condition. Where one of the centrifugal spinning methods is utilized, sufficient concrete shall be placed in the forms during charging operations to insure pipe of the specified wall thickness and with a minimum variation in wall thickness and pipe diameter throughout the length of the pipe. The duration and speed of spinning shall be sufficient to completely distribute and thoroughly consolidate the concrete and produce an even interior surface.

(4) Curing of pipe.—The pipe shall be subjected to any one of the methods of curing described in the following subparagraphs, or to any other method or combination of methods, as approved, that will give satisfactory results. Adequate facilities and space shall be provided for all curing operations. The pipe shall be cured until concrete test cylinders made in accordance with Subparagraph *e.*(1) and cured by methods comparable to those used to cure the pipe, have attained a strength of at least 4,000 pounds per square inch.

At the start of manufacturing, six cylinders will be made and cured as provided above from one single representative batch of concrete during each working shift. These cylinders will be tested in pairs at appropriate time intervals during the curing period to establish the duration of curing required to produce the minimum concrete strength required. After the curing method and period have been es-

tablished, two cylinders from each of two batches during each shift will be made and cured as provided above. One pair of cylinders consisting of one cylinder from each of two different batches will be tested at the end of the curing period and must show the minimum curing strength required in order to stop curing of the pipe. If, for any reason, the strength of either test cylinder is less than that required, curing shall be continued and the remaining pair of cylinders tested after sufficient additional curing to insure the minimum curing strength requirement. If the second pair of test cylinders does not meet the strength requirement, curing shall be continued for such additional time, as determined necessary by the contracting officer, to insure the minimum curing strength requirement. All cylinders will be tested as soon as possible after removal from curing while still in the moist condition. Test cylinders shall be protected from temperatures below 40° F before, during and after curing operations. Pipe shall be protected from temperatures below 40° F before and during operations.

(a) Steam curing.—Immediately after the pipe has been cast, it shall be enclosed within a suitable steam-curing chamber or enclosure that will protect the pipe from outside drafts and excessive loss of steam. Enclosures shall allow full circulation of thoroughly saturated steam around the inside and outside of the pipe, and the curing shall produce continuously moist surfaces of unformed concrete throughout the curing process. The ambient temperature rise

within the enclosure shall not exceed 30° F per hour. The ambient temperature within the enclosure shall not exceed 100° F within 2 hours after mixing; thereafter, the temperature shall be brought to 130° F within a period of 2 hours and maintained between 130° and 150° F until the specified curing strength is attained. The temperature within the steam-curing chamber shall be thermostatically controlled and temperatures shall be recorded on a continuous recording chart which shall become the property of the Government. Following the periods of steam curing, the pipe shall be protected from rapid drops in temperature which may damage the pipe.

(b) Water curing.—Concrete in pipe may be water cured by covering with water-saturated material or by a system of perforated pipes, mechanical sprinklers, porous hose, or by any other approved method which will keep the inside and outside continuously wet during the specified curing period.

* * * * *

g. Reinforcement.—

(1) Circumferential reinforcement.—The circumferential reinforcement shall be a single-cage circular, double-cage circular, or elliptical cage as shown in Table 1. Elliptical reinforcement will be permitted for 25- and 50-foot head classes only and only in pipe 18 to 72 inches in diameter, inclusive. All pipe with a wall thickness less than $3\frac{1}{4}$ inches shall be reinforced with a single-circular cage of steel and all pipe with wall thicknesses of $3\frac{1}{4}$ inches and more shall be reinforced with two separated cages of steel, except that elliptical cages will be accepted as provided above. The areas of circumferential reinforcement shown in Table 1 are the minimum requirement for each of

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the nominal wall thicknesses shown in the table.

In the event the pipe manufacturer furnishes pipe with a nominal wall thickness between the wall thicknesses shown in Table 1 for that size of pipe, the minimum required steel area for single-circular or elliptical cage or for inner and outer cage circular steel shall be computed as a straight-line variation between the two steel areas shown in the table for the corresponding steel arrangement.

Where single-cage circular reinforcement is used, it shall be placed from 35 to 50 percent of the wall thickness from the inner surface of the pipe: *Provided*, That the minimum concrete cover specified below shall be maintained. Where two separated circular cages of reinforcement are used, the inner and outer cages shall be placed so that the concrete cover, measured radially, over the circumferential reinforcement will be as follows:

Pipe diameter, inches	Minimum cover, inches	Maximum cover, inches
45 and less.....	$\frac{3}{4}$	1
48 through 60.....	$\frac{3}{4}$	1 and $\frac{1}{4}$
63 through 69.....	$\frac{3}{4}$	1 and $\frac{1}{4}$
72 through 96.....	1	1 and $\frac{1}{2}$

These limits on minimum and maximum cover are applicable to elliptical steel at the horizontal and vertical axes of the pipe. The circumferential reinforcement at each end of the pipe unit shall consist of one complete coil or ring in which the end is lapped or welded as prescribed in Subparagraph (3) below. The clear distance of the end coil or

ring shall not be less than one-half inch nor more than 1 inch from the end of the pipe unit.

(2) Longitudinal reinforcement.—Each layer of circumferential reinforcement shall be assembled into a rigid cage supported by longitudinal bars which extend the full length of the pipe. The minimum concrete cover for circumferential steel given in Subparagraph (1) above shall also apply to placement of longitudinal bars except that the longitudinal bars or rods may extend to either or both ends of the pipe unit to form supports for holding the circumferential cage in proper position. Not less than four longitudinal bars at approximately equal spacing shall be provided for each cage, and additional bars shall be provided as necessary so that the circumferential spacing between longitudinal bars shall not exceed 42 inches in any cage. The contractor shall also provide such additional longitudinal steel as may be necessary to prevent the occurrence of circumferential cracking in the pipe wall and to provide sufficient rigidity to the cage. Where the pipe joint construction requires the use of a bell, the minimum number of longitudinal bars shall be provided in the bell and may be continuous bars or spliced to the main longitudinal bars. The circumferential bars of each cage shall be spaced and supported by welding or tying each hoop to the longitudinal bars. Spacer bars, chairs, or other methods shall be provided to maintain the reinforcement cage or cages

in proper position within the forms during the placement and consolidation of the concrete. The spacer bars or chairs may extend to the finished concrete surfaces of the pipe.

(3) Laps, welds, and spacing.—If the splices are not welded, the reinforcement shall be lapped not less than 20 diameters for deformed bars, and 40 diameters for plain bars or cold-drawn wire. If welded, the member at either a welded splice or intersection shall develop a tensile strength not less than 52,500 pounds per square inch as determined by weld test specimens. The spacing center to center of adjacent rings of circumferential reinforcement in a cage shall not exceed 4 inches.

h. Joints.—

(1) Joints, general.—The joint assemblies shall be so formed and accurately manufactured that when the pipes are drawn together in the trenches, the pipe shall form a continuous watertight conduit with smooth and uniform interior surface, and shall provide for slight movements of any pipe in the pipeline due to expansion, contraction, settlement, or lateral displacement. The rubber gasket shall be the sole element of the joint depended upon to provide watertightness. The ends of the pipe shall be in planes at right angles to the longitudinal centerline of the pipe, except where bevel-end pipe for deflections up to 5° is specified or indicated for bends. The ends shall be finished to regular smooth surfaces. The ac-

ceptable types of joints to be used with concrete pressure pipe are:

* * * * *

(c) Concrete bell and spigot with single rubber gasket (Type R-3) as shown on Drawing No. 151 (40-D-5806) or 152 (40-D-5807).

(d) Concrete bell and spigot with single rubber gasket (Type R-4) as shown on Drawing No. 153 (40-D-5808) or 154 (40-D-5809).

* * * * *

(4) * * * * *

(g) The surfaces of the bell and spigot in contact with the gasket, and adjacent surfaces that may come in contact with the gasket within a joint movement range of three-fourths inch, shall be free from airholes, chipped or spalled concrete, laitance, or other defects, except that individual airholes may be repaired as provided in Subparagraph j. (2).

* * * * *

i. Physical test requirements.—

(1) General testing requirements.—All pipe units and test cylinders for purpose of tests shall be furnished by the contractor at no cost to the Government: *Provided*, That pipe units which satisfactorily pass testing procedures may be used for installation in pipelines and structures. The contractor shall provide at his expense adequate equipment, and all labor and materials for making the tests on pipe units. The strength of concrete and the acceptability of pipe will be determined by tests of the compressive strength of the concrete used in the pipe as provided in Subparagraphs e.(1) and e.(4), by examination of the quality, amount, and accuracy of placement

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of the reinforcement, and by hydrostatic pressure tests.

Tests on the various pipe sizes, as provided above, shall be made on pipe manufactured in each test period of consecutive working days as follows:

(a) Hydrostatic pressure tests on 1 percent, but not less than one pipe unit, of each size and class of pipe.

(b) Hydrostatic joint tests on one-half percent, but not less than one joint, for each size and class of pipe.

For the purposes of testing the pipe units, the length of the test period will be set at the number of days the plant of the pipe manufacturer is normally operated in a calendar week. The test period will include any shutdown of the pipe manufacturer's plant, which does not exceed a 24-hour period, due to failure of the plant or equipment. The length of the test period may be reduced at the discretion of the contracting officer if there is a significant change in the materials used in the pipe, in the mix proportions, or in production procedures or by numerous shutdowns of the pipe manufacturer's plant due to failures of the plant or equipment. The length of the test period may be increased at the discretion of the contracting officer when results of tests for successive periods indicate that the contractor's operations are productive of uniformly acceptable pipe.

In the event that a pipe unit fails to withstand the required tests, the contractor shall have the right to

test two other units of the pipe selected by the contracting officer from the same test period's run from which the original was selected. If these two pipe units successfully pass the test, the remainder of the pipe in that test period's run will be accepted. If either of these pipe units fail, then the remainder of the test period's run will not be accepted until each pipe unit has satisfactorily passed the tests.

(2) Hydrostatic test on pipe units.—Hydrostatic tests on the pipe units shall be made by applying suitable bulkheads at each end of the pipe and filling the pipe with water. Before the test pressure is applied the pipe shall be allowed to stand under a pressure of 10 pounds per square inch for at least 3 hours. Acceptance hydrostatic tests shall be made to 120 percent of the specified internal pressure of the pipe class for which it is designed. The pipe shall withstand the test pressure prescribed above for at least 20 minutes without cracking and with no leakage appearing on the exterior surface. Moisture appearing on the surface of the pipe in the form of patches, or beads adhering to the surface will not be considered as leakage. Slow forming beads of water that result in minor dripping which can be proved to seal and dry up within 1 week while under the prescribed test pressure will be considered acceptable.

(3) Hydrostatic test of rubber gasket-type joints.—Hydrostatic pressure tests of rubber gasket-type

joints shall be made on joints assembled of two units of pipe, properly connected in accordance with the joint design. Suitable bulkheads may be provided within the pipe adjacent to and on either side of the joint, or the manufacturer may bulkhead the outer ends of the two joined pipe units and conduct hydrostatic tests on both the pipe and the pipe joint concurrently. No mortar or concrete coatings, fillings, or backings shall be placed prior to joint watertightness tests. After the pipe units are fitted together with the rubber gasket or gaskets in place, the watertightness of the joints shall be tested under hydrostatic heads of 120 percent of the pressure for which the pipe is designed, and there shall be no water leakage through the rubber gasket joint.

* * * * *

j. Miscellaneous Requirements.—

(1) Sizes and permissible variations.—Variations of the internal diameter shall not exceed plus or minus 1.50 percent for pipe having an internal diameter of 12 to 24 inches, inclusive; 1 percent for pipe 27 to 36 inches, inclusive; and 0.75 percent for 39-inch diameter and larger: *Provided*, That in not more than 10 percent of the pipe units of any one size to be installed in one continuous reach of pipeline, up to two times the above-listed permissible variations will be accepted if such variation does not extend more than one-fourth of the length of the pipe unit. Within this distance the net area of the pipe opening shall

not be reduced by more than 4 percent for pipe having internal diameters of 12 to 36 inches, inclusive, or more than 3 percent for pipe having internal diameters 39 inches and larger and the transitions to the restricted area shall be gradual and smooth.

The wall thickness shall not be less than the manufacturer's nominal wall thickness by more than 5 percent at any point.

* * * * *

(2) Finish.—Pipe shall have cylindrical interior surfaces and shall be free from fractures, excessive interior surface crazing, and roughness. The interior and exterior surfaces shall be concentric at any normal cross section of pipe. Pipe manufactured by pouring and vibrating methods within stationary inside and outside forms shall have smooth glossy surfaces, relatively free from pits and air holes.

Pipe manufactured by a centrifugal spinning method shall be free from excessive brush marks, that indicate hard brushing of the interior surface for the removal of water and laitance, and which will markedly affect the water-carrying capacity of the finished pipeline. Float rock or other light materials such as clay balls or wood particles appearing on the inside surface of the pipe will be cause for rejection.

Individual air holes in gasket bearing areas of precast-concrete pipe may be filled with a hand-placed, stiff, preshrunk 1:1 mortar of cement and fine sand with no other preparation than thorough

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washing with water. Such fillings shall be kept moist under wet burlap for at least 48 hours or steam cured as required in Subparagraph *e*.(4) (a) for a minimum of 12 hours. All other repairs shall be made in accordance with the procedures of Chapter VII of the Sixth Edition of the Bureau of Reclamation Concrete Manual.

* * * * *

o. Hauling and handling.—Pipe shall not be stored in the manufacturer's yard or at the jobsite for an extended period of time under conditions which would cause injurious drying out of the concrete. Whenever necessary, in order to prevent cracking of the concrete or other objectionable effect of drying, stored pipe shall be adequately protected by means of shelter and application of water. The pipe shall not be dropped or subjected to any unnecessary jar, impact, or other treatment that might crack the shell or otherwise damage the pipe. No pipe shall be hauled to the site of the work until it has attained the strength after full curing specified in Subparagraph *e*.(4) unless otherwise approved by the contracting officer.

* * * * *

APPENDIX B

Chapter VII, Section 137

Bureau of Reclamation, Concrete Manual, Sixth Edition

137. Procedure for Repair of Precast Concrete Pipe.—(a) General.—Repair of precast concrete pipe, although not basically dif-

ferent from repair of structural concrete, is discussed separately for convenient reference to detail procedures for such work. If followed closely, these procedures will result in substantial repairs, and pipe not repaired in accordance with these procedures should not be accepted.

Most imperfections in and damage to precast concrete pipe, such as inadvertent or occasional imperfections or damage that occurs during normal operations, can be repaired and the pipe made acceptable. But repairs should not be permitted when the imperfections or damage are the result of continuing failure to take known corrective action to eliminate the cause of the imperfections or damage. Imperfections and damage that can normally be repaired are:

(1) Rock pockets.

(2) Exposed steel on the outside of any size pipe and on the inside of pipe 36 inches or larger in diameter.

(3) Roughness due to form-joint leakage.

(4) Broken bells containing circumferential reinforcement.

(5) Impact damage over less than 45° of circumference except for spigots.

(6) Fractures or cracks passing through the shell.

(7) Out-of-round bells, if not so far out of round that reinforcement steel will be exposed after the repair.

(8) Spalled shoulders on spigots for support of rubber gaskets.

(9) Air holes and roughness in the gasket bearing surfaces of bells and spigots.

Imperfections and damage that cannot normally be repaired are:

(1) Spigots or bells that are out of round or are off center to the extent that reinforcement would be exposed after the repair.

(2) Spun pipe out of limits for diameter because of an excess or deficiency of concrete having been placed in the form.

(3) Porous, unconsolidated spigots in dry-tamped pipe.

(4) Exposed steel inside of pipe smaller than 36 inches in diameter.

Repairs should not be permitted on pipe damaged by impact when the damaged area covers more than 45° of the pipe circumference. Also, repairs should not be permitted on gasketed spigots if the break is entirely through the shell and into or beyond the area of gasket bearing and extends more than 4 inches around the circumference under the gasket. Pipe that is imperfect or damaged beyond repair on one end can frequently be cut and the good end used at structure connections.

(b) Methods of Repair.—Repair of imperfections in or damage to precast concrete pipe may be made with hand-placed mortar, pneumatically applied mortar, or concrete, depending upon the severity and location of the imperfection. Before preparations are started for the repair of any pipe, except very minor repairs, the method of repair should be approved by a Government inspector.

Hand-placed mortar should be used only for making superficial repairs on the outside of pipe, or for making minor repairs on the inside of pipe that is too small to permit application of pneumatically applied mortar (usually pipe smaller than 36 inches in diameter). Pneumatically applied mortar should be used for the repair of all other shallow surface imperfections, such as to cover exposed reinforcement steel on the outside of any size pipe and on the interior of pipe 36 inches or more in diameter, and to build up spalled shoulders on spigots for support of rubber gaskets. Pneumatically applied mortar should not be used where more than one-half square foot of the area to be repaired extends back of reinforcement steel. Preshrunk concrete should be used for the repair of all other imperfections including area where more than one-half square foot of the area extends back of reinforcement steel.

(c) Preparation of Imperfections for Repair.—All visibly unsound or imperfect concrete should be removed before any type of replacement is made. Where pneumatically applied mortar is to be used for the replacement, unsound materials should be removed to any shape with beveled edges that will not entrap rebound. Where hand-applied mortar is to be used for the replacement, the area requiring repair should be chipped to a depth of not less than three-fourths of an inch; the edges of the area should be sharp and squared with the surface, leaving no feathered edges. Where concrete

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is to be used for the replacement, the old concrete should be removed to a depth of at least 1 inch back of the first layer of reinforcement steel, even though this involves removal of good concrete. The edges should be sharp and squared with the surface, leaving no feather-edges. Keys are not necessary.

As soon as the chipping is completed and the area is acceptably shaped for the selected repair method, the surface of old concrete should be given a preliminary washing to remove all loose material and stone dust. Surfaces within the trimmed holes should be kept wet for several hours, preferably overnight, before the repair replacement is made. This is best done by packing the holes or covering the area with several layers of wet burlap as shown in figures 144, 145, and 146. Immediately before new material is applied, all surfaces of the trimmed holes or areas to be filled should be thoroughly cleaned with wet sandblasting, followed by washing with an air-water jet to remove all foreign material, dried grout, and any material crushed and embedded in the surfaces by chisels or other tools during trimming. Some equipment for placing pneumatically applied mortar is effective for wet sandblasting. Other devices such as the air-suction gun shown in figure 105 may be used if they will produce acceptable results. Surfaces to which the replacement is to bond should be damp but not wet when new material is applied.

The prepared surfaces should be inspected before the repair is made.

(d) Hand-Placed Mortar Replacement.—For the application of hand-placed mortar, the pipe should be turned so that the area to be repaired will be upward and the new material will rest on concrete of the pipe. The mortar used for the replacement should have the same proportions and air entrainment as the mortar used in the mix of which the pipe was made. The repair mortar should be preshrunk by mixing it to a plastic consistency as long in advance of its use as the cement will permit. Depending on mix, cement, and temperature, the time for preshrinking should range from 1 to 2 hours. Trial mixes should be made and aged to determine the longest period of delay that the mortar, after reworking, will have sufficient plasticity to permit application. The mortar should be stiff as possible and yet permit good workmanship. It is not intended or expected that this relatively stiff, preshrunk mortar should be applied as readily as ordinary plaster.

Immediately prior to application of mortar, the damp surface to which the new mortar is to bond should be scrubbed thoroughly with a small quantity of mortar, using a wire brush. Remaining loose sand particles should be swept away immediately before application of the mortar. The mortar should be compacted into the surface, taking care to secure tight filling around the edges, and shaped and finished to

correspond with the undamaged surface of the pipe.

(e) Pneumatically Applied Mortar Replacement.—For pneumatic application of mortar, the pipe should be turned so that the area requiring repair is in a near vertical position so that rebound will fall free and will not be included in the replacement. When pneumatically applied mortar is used to cover exposed steel on the outside surface of a pipe, the coating should be at least three-fourths of an inch thick. A similar coating on the inside surface should be between one-half and three-fourths of an inch thick. The mortar coating should extend 1 foot in each direction beyond the limits of the exposed steel.

Pneumatically applied mortar on the outside surface of a pipe should not be finished other than to sweep off any rebound that would interfere with a good membrane coat of white-pigmented sealing compound. After repair of pipe interior, bells, and spigots by means of pneumatically applied mortar, the surfaces should be trimmed to correct shape, care being taken to avoid damage to bond. Interior surfaces should be finished only by rubbing lightly with a damp rag. Bell-and-spigot surfaces should be tooled and finished to conform to requirements for the joint.

Standard commercial equipment of a small size commensurate with the small areas to be treated is available from several manufacturers. Also, the equipment shown in figure 105 is adaptable for such work.

(f) Concrete Replacement.—For replacement repairs made with concrete, the pipe should be turned so that the area where concrete is to be placed will be on the top of the pipe for an outside repair or on the bottom of the pipe for an inside repair. The pipe should be in the latter position for repair of holes completely through the pipe shell, with the pipe lying in a segment of an outside form. Concrete replacement repairs to bells and spigots should be cast with the pipe in a vertical position with the area to be repaired at the top end of the pipe.

Proportions of concrete used for replacement should be the same as used in the original concrete, including the size and amount of sand and gravel and the amount of cement and air-entraining agent. The slump of the concrete as mixed should be between 2 and 3 inches, but the concrete should not be placed until the slump has dropped to zero. The delay for preshrinking concrete should be as long as the concrete will still respond to vibration and a running vibrator will sink into the concrete of its own weight. Such preshrunk, stiff concrete can be molded by ample vibration into an open, unformed horizontal area with little difficulty and will be much less subject to shrinkage than ordinary concrete.

Immediately prior to placing preshrunk concrete, the prewetted, clean, damp surfaces of old concrete to which the new work is to be bonded should be coated with a thin layer of plastic mortar similar in

mix to that in the concrete. The mortar should be worked thoroughly into the old concrete surface by means of shooting with one of the air guns, by brushing, or by rubbing with the hand encased in a rubber glove.

(g) Curing of Repairs.—New repairs should be covered with 4-ply wet burlap as soon as the burlap can be applied without damage to the surface. The wet burlap should be held in position with boards or forms, as shown in figure 146.

Repairs at joints should be cured for 7 days under continually wet burlap in close contact with the repaired surface. On other repairs, the wet burlap may be removed at the end of the first 24 hours and the surface coated with membrane coating of an approved white-pigmented sealing compound. If the surface of the repair is not moist when the burlap is removed, moist curing should be continued for an additional 24 hours before the sealing compound is applied.

(h) Testing Repaired Pipe.—Each pipe on which major repairs have been made, such as repairs extending through the shell thickness or large repairs to bells, should be tested at the service head in order to assure that the repair is competent. Occasional pipe having lesser repairs capable of affecting performance of the pipe if the repairs are not sound should be tested to assure the security of such typical lesser repairs. Representative units of cracked but unshattered pipe should be tested and, if there is no

leakage at 50-foot head other than sweating, the pipe may be accepted for heads of less than 50 feet. Repairs should be aged for at least 1 month after the specified water curing, then inspected to determine the adequacy of bond before the pipe is tested.

BISH CONTRACTING COMPANY, INC.

IBCA-951-1-72

Decided February 12, 1973

Contract No. 14-10-7-971-254

Construction of Roads, Parking and Walks, Business Center, South Rim, Grand Canyon National Park, Arizona, National Park Service.

Denied.

Contracts: Construction and Operation: Modification of Contracts—Contracts: Disputes and Remedies: Burden of Proof—Rules of Practice: Appeals: Burden of Proof

A construction contractor's claim for an equitable adjustment is denied where the evidence shows that payment for the overlay work involved in repairing eroded pavement was provided for in an accepted change order and the appellant failed to sustain its burden of showing that the straitened financial circumstances in which the contractor was in at the time of the change order was the result of wrongful action by the contracting officer or other Government personnel administering the contract

under which the claim of duress was asserted.

APPEARANCES: William F. Haug, Attorney at Law, Jennings, Strouss & Salmon, Phoenix, Ariz., for the appellant; Ralph O. Canaday, Department Counsel, Denver, Colo., for the Government.

*OPINION BY MR. McGRAW
INTERIOR BOARD OF
CONTRACT APPEALS*

The appellant, Bish Contracting Company, Inc., entered into a contract with the National Park Service, under date of May 7, 1970, for the construction of roads, parking and walks in the Business Center, South Rim, Grand Canyon National Park, Arizona. The contract amount, as increased by change orders, was \$393,372.25.¹

Resolution of this dispute requires the Board to determine the effect to be given to Change Order No. 3. Contending that because of economic duress it was coerced into accepting the terms of the Change Order, the appellant seeks to have it declared null and void. Appellant also requests an equitable adjustment of \$11,730.55² under Clause 34(a)³ of the General Provisions.

¹ Exhibit F. Except as otherwise indicated, all references to exhibits are to those contained in the appeal file.

² Affidavit of Russell Bish, dated July 12, 1972. This was one of the documents added to the existing record at the request of appellant's counsel. See extensive excerpt therefrom in Appendix.

³ "34. CHANGE ORDERS:

"(a) Additional costs. In conformance with Clause 57, 58 and 10 of these General Provisions the cost of any change ordered in writing by the Contracting Officer which results

The Government contends that Change Order No. 3 was issued as a result of arms' length bargaining between the parties and that appellant is bound thereby. It further asserts that appellant may not prevail for lack of having made a timely claim for adjustment under Clause 57(e)⁴ of the General Provisions.

in an increase in the contract price will be determined by one or the other of the following methods, at the election of the Contracting Officer:

"(1) On the basis of a stated lump sum price, or other consideration fixed and agreed upon by negotiation between the Contracting Officer and the Contractor in advance, or if this procedure is impracticable because of the nature of the work or for any other reason.

"(2) On the basis of the actual necessary cost as determined by the Contracting Officer, plus a fixed fee to cover general supervisory and office expense and profit. The fixed fee shall not exceed fifteen percent of the actual necessary costs. The actual necessary cost will include all reasonable expenditures for material, labor, and supplies furnished by the Contractor and a reasonable allowance for the use of his plant and equipment where required, but will in no case include any allowance for general superintendence, office expense, or other general expense not directly attributable to the extra work. In addition to the foregoing the following will be allowed: the actual payment by the Contractor for workman's compensation and public liability insurance; performance and payment bonds (if any); and all unemployment and other social security contributions (if any) made by the Contractor pursuant to Federal or State statutes, when such additional payments are necessitated by such extra work.

"An appropriate extension of the working time, if such be necessary, also will be fixed and agreed upon, and stated in the written order."

* * * * *

"57. CHANGES:

* * * * *

"(e) If the Contractor intends to assert a claim for an equitable adjustment under this clause, he must, within 30 days after receipt of a written change order * * * submit to the Contracting Officer a written statement setting forth the general nature and monetary extent of such claim, unless this period is extended by the Government. * * *"

February 12, 1973

Motion to Dismiss

The Government has twice moved to dismiss this appeal on the grounds that appellant is seeking to reform Change Order No. 3. By Order dated May 22, 1972, the Board denied the motion noting that on a motion to dismiss the question of the Board's jurisdiction is determined on the basis of appellant's claim and not by the nature of the Government's defense. The Government has renewed its motion to dismiss in its Memorandum Brief, dated August 28, 1972. The Board's authority to consider and decide the validity of certain actions taken under a contract and challenged on the ground of economic duress is considered to be well established by settled administrative practice;⁵ the motion is therefore again denied.

The contract provided for work on the "Main Road" portion to be delayed until after Labor Day, 1970, because of heavy tourist traffic during the summer months.⁶ By letter dated September 17, 1970, Mr. David O'Kane, the Project Supervisor, instructed appellant to "[g]rade, base, [and] prime all roads and begin paving by October 15, weather permitting."⁷ The actual surfacing began on October 21 and was completed, except for the application of the bituminous seal coat, on November 17, 1970. The Government instructed the appel-

lant to delay the application of the seal coat until warm weather conditions existed in the early summer.⁸

During the winter months several areas of the unsealed pavement eroded. The areas in question were portions of the main road in front of the Administration Building and the road in front of Babbitt's Store.⁹ On May 13, 1971, a meeting was held between representatives of the National Park Service and the appellant to discuss the pavement failure. According to a Government summary of the meeting,¹⁰ Mr. Speer, the subcontractor, indicated his willingness to "overlay anything that the NPS asked" but felt he should be paid for such additional work because the pavement failure was not due to "faulty work." Mr. Bish said that the contractor would file a claim if it had to pay for the repair, as the fault was not workmanship but conditions. The parties discussed probable reasons for the pavement failure and agreed to call upon experts to ascertain definitively the causes of the erosion. The appellant and its expert concluded¹¹ that the primary cause of the erosion was the failure to apply a seal coat immediately after the pavement was laid. As the result of a meeting with the contractor in May or early June of 1971, the Government determined that responsibility for failure of the payment lay princi-

⁵ See *Airmotive Engineering Corporation*, ASBCA No. 15235 (July 13, 1971), 71-2 BCA par. 8988 at 41,755 (concurring opinion).

⁶ Exhibit G (Addendum No. 1).

⁷ Exhibit "A", attached to appellant's Complaint.

⁸ Exhibit "F", Findings of Fact.

⁹ Exhibit B-1 and Exhibit F, Map.

¹⁰ Exhibit B-1.

¹¹ Affidavit of John B. Hauskins, dated July 11, 1972. The affidavit was added to the existing record at the request of appellant's counsel.

pally with Government and that the contractor should be compensated for required remedial work.¹² A second meeting took place on "approximately June 9, 1971."¹³ Mr. David O'Kane, Mr. Donald Purse, and Mr. Ed Bleyhl¹⁴ of the National Park Service met with Mr. Bish in his construction trailer. Appellant says that the "purpose of this visit was to discuss [the eroded portions] of the pavement * * * which * * * needed an additional overlay paving."¹⁵ According to the Government, this meeting produced the agreement that provided the basis for Change Order No. 3.¹⁶ The affidavits of three of the four participants in the June 9 meeting have been added to the record by the parties.¹⁷ According to Mr. Bish's affidavit,¹⁸ Mr. Purse said he was going to order him (Bish) to do the overlay paving and that if he was to be paid he would have to accept Purse's offer of doing the overlay work at the original contract unit prices. Mr. Bish states that at the same time he was told by Mr. Purse that his only other alternative would be to do the work at his own expense and later

submit a claim. The affidavit further asserts that Mr. Bish did not have the money to complete the overlay paving at his own expense; that this fact was known to the Government; and that he therefore accepted Mr. Purse's proposal that the contractor perform the repair work at the contract unit prices.

In addition to denying that he had any knowledge of the contractor's financial status at the time of the June 9 meeting, Mr. Purse states:

* * * During the course of the meeting it was agreed that the work required would be accomplished at the contract unit prices for the three elements of work involved. The Contractor appeared to accept the agreed prices readily and seemed satisfied that the overlay work would be done on that basis. I did not at any time tell Mr. Bish that he would be directed to do the overlay work at his expense if he did not agree to contract unit prices.¹⁹

Mr. O'Kane's affidavit gives the following account of what transpired:

* * * during the course of this meeting Mr. Purse asked Mr. Bish to do the paving overlay at the contract price inasmuch as the Government had paid for a pavement which had failed for reasons not necessarily the fault of the prime contractor. * * * Mr. Bish very reluctantly agreed to accept the contract bid price for paving after conferring by phone with sub-contractor Speer, stating he would lose money on the operation and felt himself caught in a situation primarily caused by the weather.²⁰

Mr. O'Kane also states that Mr. Bish "may also have mentioned he

¹² Affidavit of Leroy E. Marcroft, Contracting Officer, dated August 4, 1972. This affidavit and the affidavit of David A. O'Kane, Project Supervisor and Donald A. Purse, Construction Coordinator in the Western Service Center, were added to the existing record at the request of Government counsel.

¹³ Government Brief, p. 8. Affidavits of Messrs. Bish, O'Kane and Purse, notes 2 and 12, *supra*.

¹⁴ Outgoing Project Engineer, Construction Coordinator and incoming Project Engineer, respectively.

¹⁵ Note 2, *supra*.

¹⁶ Government Brief, p. 3.

¹⁷ No affidavit has been submitted by Mr. Bleyhl.

¹⁸ See Appendix.

¹⁹ Note 12, *supra*.

²⁰ Note 12, *supra*.

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could be hurt financially by liquidated damages if he did not receive relief from the U.S. Forest Service" under a contract requiring work in Pennsylvania.

Also on June 9, 1971, Mr. Bish wrote to the contracting officer confirming his "commitment to perform [the] additional work at the original contract unit prices."²¹

Change Order No. 3 was issued on June 14, 1971, and accepted by the appellant on June 16, 1971.²² It incorporated substantially the terms of appellant's June 9 letter. It provided for a net increase of \$13,740 and 20 additional calendar days (to August 22, 1971) to complete the work.

On August 31, 1971, appellant for the first time objected to Change Order No. 3, which had been issued six weeks before. Mr. Bish wrote the contracting officer in part as follows:

At the time that this change was negotiated, we were under extreme pressure to resolve the problem of the eroded pavement and to commence work on the solution prior to the start of the summer rains which would have seriously aggravated [sic] the problem. We agreed with you to do this added work at the original contract unit prices knowing that at best we could only break even financially. It is obvious now that we agreed too hastily to your terms for we

lost nearly \$8900.00 doing this added work.²³

Referring to what he characterizes as extenuating circumstances, the contractor asserts that the Change Order should be renegotiated.

On December 16, 1971, the contracting officer issued a "final determination and finding of fact" in which he rejected appellant's claim. The finding states:

All of the facts now evident as to the causes and responsibility for the paving failure were known to both parties prior to signing the change order. It had been mutually agreed to on the site during a meeting between the Contracting Officer and the Contractor with the advice and assistance of interested parties on both sides. The prices used were those bid by the Contractor for the original job and at the time seemed equitable to both parties. * * *²⁴

The contractor appealed from this findings and decision by letter dated December 22, 1971.²⁵ The appeal has been submitted to the Board on the record without a hearing.

Decision

The appellant contends that since it was not responsible for the erosion which necessitated the work covered by Change Order No. 3, the appellant had no obligation "to agree

²¹ Exhibit B-4. The prices were set out as follows:

"800 tons (Est) Plant Mix @ \$20.00/ton = \$12,000. 36 tons (Est) 85-100 Asphalt @ \$35.00/ton = \$1,260." In this letter the contractor also said that if required, a tack coat could be applied "at the contract unit price for Seal Coat, namely \$100.00/ton."

²² Exhibit F.

²³ Exhibit B-5. This exhibit and Mr. Bish's affidavit of July 12, 1972 (See Appendix) both indicate that the "extreme pressure" resulted from Mr. Bish's fear that the start of the summer rains would seriously aggravate the problem of the eroded pavement.

²⁴ Exhibit A-1.

²⁵ Exhibit A-2.

to do the overlay paving at a loss.”²⁶ Appellant also maintains that had it known of the existence of an undated “inhouse” Findings of Fact,²⁷ issued in conjunction with Change Order No. 3, it would not have signed that Change Order because the findings are viewed as establishing that the Government was at fault for the pavement’s failures.²⁸ The findings contain the following statements:

Numerous samples and cores were taken and tested by Federal Highway Engineers in May 1971. Their tests results verify that the cause of [pavement] failure was emulsification. A private testing company, Sergeant, Hauskins and Beckwith of Phoenix, was retained by the Contractor to do matching testing and their results generally confirm that of the FHA. It was generally agreed by all parties that the pavement would not have failed if moisture could have been excluded from the surface material by the addition of the seal coat. Since this condition was not foreseen, it becomes a mutual problem of the Government and the Contractor. The Contractor has offered to do the work for a price considered acceptable and without increasing the Unit Prices bid on the original contract to cover his extra move-in move-out costs and it would be impractical for another to furnish the manpower and equipment to accomplish the work for the same or a lesser price. * * *

The work should be accomplished very quickly as the summer rains are due to start within a month.

This document indicates that the Government recognizes some re-

sponsibility²⁹ for the pavement failures. Except for Mr. Bish’s affidavit³⁰ there is nothing in the record to indicate that appellant’s motivation in signing Change Order No. 3 stemmed from a mistaken belief as to where the responsibility lay for the failure of the pavement. The fact that appellant’s work was not faulty³¹ was confirmed prior to the signing of Change Order No. 3 by appellant’s investigator, John B. Hauskins.³² The appellant has failed to show that it was prejudiced by the Government’s failure to send it a copy of the “inhouse” findings prior to the time Change Order No. 3 was executed.

The appellant also argues that its agreement to do the overlay paving at a loss is evidence of the involuntariness of the agreement.³³ Eco-

²⁶ A clearer recognition of Government responsibility is contained in the affidavit of the contracting officer (Note 12, *supra*, and accompanying text). In view of this recognition, we have not required the Government to furnish the daily inspection reports covering the period during which the bituminous paving was laid. While the letter from appellant’s counsel of July 17, 1972, indicates that such reports would be important to show the adverse weather conditions which existed at the job site and contributed to the lack of compaction, we note that this was before appellant’s counsel was furnished a copy of the “inhouse” findings which is viewed as clearly establishing Government responsibility for the pavement failures (notes 27 and 28, *supra*).

²⁷ Note 28, *supra*.

²⁸ This was the position taken by both the Contractor and the Subcontractor in the meeting with the Contracting Officer on May 13, 1971 (note 10, *supra*).

²⁹ Affidavit of Mr. Hauskins (note 11, *supra*).

³⁰ Appellant’s Brief, p. 13. According to the letter of August 31, 1971 (Exhibit B-5), the contractor agreed to do the work covered by the change order at the original contract unit prices “knowing that at best we could only break even financially.”

²⁶ Appellant’s Brief, p. 12.

²⁷ Exhibit F. A copy of the “inhouse” findings was not furnished to the appellant or its counsel until September 5, 1972.

²⁸ Affidavit of Mr. Bish, dated September 11, 1972. (Exhibit No. 2 to the Special Reply Memorandum of appellant.)

February 12, 1973

conomic duress may not be implied, however, merely from the fact that a hard bargain may have been made.³⁴

Another contention advanced by the appellant is that the circumstances attending the negotiations of Change Order No. 3 constituted coercion on the part of the Government. The circumstances identified by the appellant as constituting such coercion were: (1) the Government's knowledge that at the time of the negotiation the appellant was not in a cash position; (2) the pressure on appellant to commence work on the project prior to the start of the summer rains; and (3) the dilemma confronting the appellant in having to choose between consenting to do the overlay work at contract unit prices or financing such work entirely from its own funds and thereafter submitting a claim.³⁵ As we have previously noted, appellant registered no dissatisfaction with the terms of Change Order No. 3 until six weeks after its execution,³⁶ when the work was completed. Undisputed is the contracting officer's sworn statement that he "inquired of Mr. Bish as to whether or not the contract unit prices were acceptable to him and gave him ample opportunity to quote different prices * * *" but that Mr. Bish "declined to avail himself of such opportunity."³⁷

³⁴ *Aircraft Associates & Mfg. Co., Inc. v. United States*, 174 Ct. Cl. 886, 896 (1966).

³⁵ Appellant's Brief, pp. 13-15.

³⁶ Exhibit B-5.

³⁷ Affidavit of Leroy E. Marcroft (note 12, *supra*).

The affidavits of the parties to the June 9 meeting present a conflict as to whether appellant was reluctant to accept Change Order No. 3. They show clearly, however, that the financial position in which appellant found itself at the time of the negotiations was not caused by the National Park Service. Even if appellant had conclusively established its reluctance, this of itself is not the equivalent of duress or business compulsion. There must, in addition, be proof of acts on the part of the Government to which the appellant's difficulties are attributable.³⁸ Here, no such showing has been made. While we do not question that the appellant was in straitened circumstances at the time Change Order No. 3 was negotiated,³⁹ the case is considered to be governed in this respect by the recent holding in *LaCrosse Garment Mfg. Co. v. United States*, 193 Ct. Cl. 168

³⁸ See *Loral Corporation v. United States*, 193 Ct. Cl. 473, 481-482 (1970), in which the Court stated:

"In discussing the law on duress, we feel that *Fruhauf Southwest Garment Co. v. United States*, 126 Ct. Cl. 51, 111 F. Supp. 945 (1953), even though it deals with a subsequent modification, is the clearest presentation of the position of this court. In that case, 126 Ct. Cl. at 62, 111 F. Supp. at 951, we stated in respect to economic duress or business compulsion that:

"* * * In order to substantiate the allegation of economic duress or business compulsion, the plaintiff must go beyond the mere showing of a reluctance to accept and of financial embarrassment. There must be a showing of acts on the part of the defendant which produced these two factors. The assertion of duress must be proven to have been the result of the defendant's conduct and not by the plaintiff's necessities."

³⁹ See Appendix.

(1970), in which at page 177 the Court states:

* * * A party induced by the want of money, to which the defendant has not contributed, to accept a lesser sum than he claims is due is not under legally recognized economic coercion or duress. Some wrongful conduct must be shown to shift to defendant the responsibility for bargains made by plaintiff under the stress of financial necessity. * * *

We are unable to find that the appellant has sustained its burden of showing that it accepted Change Order No. 3 under duress. The appeal is therefore denied.

WILLIAM F. MCGRAW, *Chairman.*

I CONCUR:

SPENCER T. NISSEN, *Member.*

APPENDIX

Excerpt from Affidavit of Russell Bish

6. * * * Mr. Purse informed me that he was willing to pay me to overlay pave the eroded areas at the original contract unit prices. I informed him that we could not possibly do that work at the original contract's price, because it would be impossible to place 450 tons of hot mix required for the overlay at the same unit price for which we had originally agreed to place more than 3,500 tons under the original contract. Obviously due to our fixed costs and economies of scale, we could not place 450 tons at the same price that we had agreed to place 3,500 tons of the hot mix. Mr. Purse then informed me that he was going to order me to do the overlay work and that if I was to be paid I would have to accept his offer of

doing the overlay work at the original contract unit price. He explained to me that my only other alternative would be to do the overlay paving at my own expense and thereafter submit a claim for the amount of money I felt I should be entitled to. I did not have the money at that time to complete the overlay paving at my own expense. This fact was well known to Mr. Dave O'Kane who had been working with me on this project at the Grand Canyon for over a year. Mr. O'Kane and I on numerous occasions had discussed my financial difficulties, due to another project in which I was involved with the U.S. Forest Service in Pennsylvania, and Mr. O'Kane was well aware that I did not have a cash position which would have permitted me to finish the contract at my own expense. Mr. Purse asked for an immediate answer to his offer and said that he needed to know right away, inasmuch as it was approximately 12:30 p.m. and he was catching a 1:00 o'clock plane. I told him that I would need to talk his offer over with my subcontractor, Mr. Don Speer of D.C. Speer Construction Co. I immediately called Mr. Speer on the phone and discussed the Government's offer with him. Mr. Speer informed me that he was not in a position to finance the overlay paving and since he did not feel any responsibility for the erosion that he could only do the job for me for what it would cost him, and that I would have to pay the difference. Therefore, because I was not in a financial position to complete the project and pay the costs out of my own pocket, I told Mr. Purse that I would accept his offer even though it would not be possible to do the work at the original contract price. That at the time of these discussions, I was under extreme pressure to commence work on the project prior to the start of the summer rains, which would have further aggravated the erosion, a fact which was known to the Government personnel involved.

February 14, 1973

RIMROCK CANAL COMPANY**9 IBLA 333**Decided *February 14, 1973*

Appeal from decision (Idaho 3002) of Idaho Land Office, Bureau of Land Management, which rejected a right-of-way application.

Affirmed.

Rights-of-Way: Generally—Rights-of-Way: Act of March 3, 1891

There is no grant of a right-of-way under the Act of March 3, 1891, as to withdrawn lands without approval of the Secretary of the Interior, who may deny an application and approval of maps filed thereunder upon reasonable grounds, or condition approval as to the location of the improvements to be constructed.

Administrative Practice—Fish and Wildlife Coordination Act: Generally—Rights-of-Way: Generally—Rights-of-Way: Act of March 3, 1891—Withdrawals and Reservations: Generally

Where land has been withdrawn for state management as a wildlife area under the Fish and Wildlife Coordination Act, the Bureau of Land Management must consider the recommendations of the state and of the Bureau of Sport Fisheries and Wildlife to assure conservation of the fish and wildlife before approving a right-of-way application under the Act of March 3, 1891, for a pumping site and irrigation system.

Applications and Entries: Generally—Fish and Wildlife Coordination Act: Generally—Rights-of-Way: Generally—Rights-of-Way: Act of March 3, 1891

A Bureau of Land Management decision which rejected an application under the

Act of March 3, 1891, for a pumping station and irrigation system within a small cove of a reservoir withdrawn for a fish and wildlife management area pursuant to the Fish and Wildlife Coordination Act, will be sustained where it was made in due regard for the public interest in managing the area in light of that Act.

APPEARANCES: James L. Morrison, for appellant.

OPINION BY MRS. THOMPSON, INTERIOR BOARD OF LAND APPEALS

James L. Morrison for Rimrock Canal Company has appealed a decision of the Idaho Land Office, Bureau of Land Management, dated September 15, 1970, which rejected a right-of-way application for an irrigation system filed pursuant to the Act of March 3, 1891, 43 U.S.C. § 946 (1970). The public land over which the right-of-way is sought is the S $\frac{1}{2}$ NE $\frac{1}{4}$ sec. 35, T. 5 S., R. 4 E., B.M., Idaho. The SW $\frac{1}{4}$ NE $\frac{1}{4}$ of this section has been withdrawn for a wildlife management area and a federal power project.

The application for the right-of-way was filed on June 6, 1969. It stipulated that if it were approved, it would be subject to the applicable regulations. The application was signed by James L. Morrison for Rimrock Canal Company. It was also originally signed by Dolly V. Morrison and Joe Morrison. Thomas Timbers subsequently signed the application on October 13, 1970.

The application includes a proposed water pumping site within the withdrawn area and on the shore of

C.J. Strike Reservoir, and also an irrigation pipeline and ditch right-of-way. On August 6, 1969, the Land Office notified James L. Morrison that the State of Idaho Department of Fish and Game and the Bureau of Sport Fisheries and Wildlife, United States Department of the Interior, objected to the proposed location of the pumping site in a small cove of the reservoir because it might adversely affect waterfowl hunting. The letter stated that the Fish and Game Department had no objection to the site if it were to be located at least 1,000 feet south of the proposed location. Morrison was invited to discuss any alternative proposals and to make a field inspection with state and federal officials to locate a new site.

Subsequently, on February 17, 1970, representatives of the Bureau of Land Management, the Idaho Department of Fish and Game, and the Bureau of Sport Fisheries and Wildlife, made a field trip with Morrison to inspect the proposed site. The Idaho Department of Fish and Game and the Bureau of Sport Fisheries and Wildlife continued their objection, but would consent to the application if the site were relocated 1,000 feet to the north or south.

The Land Office decision recited the history heretofore discussed and rejected the application. The rejection was for the reason the Bureau of Sport Fisheries and Wildlife and the Idaho Department of Fish and Game objected to the proposed location of the pumping plant in that

it would detrimentally affect the value of the cove site for fish and wildlife habitat and recreational purposes. The decision also held that the application was deficient in that: (1) the proper documents were not filed to evidence that the Rimrock Canal Company was legally organized as a corporation, association, or partnership; (2) evidence from the state was not submitted to show that the water right had been granted; (3) Thomas Timbers, whose name was in the mutual agreement and water permit application as a participant, was not included as an applicant in the right-of-way application or on the map. Although the application was rejected, appellant was given the right to amend the application by relocating the pumping plant to an acceptable location, and to correct the procedural deficiencies within 60 days of the decision. The decision advised appellant if additional time was needed to comply with the requirements, a written request would be given immediate consideration.

Appellant's letter of September 24, 1970, attempted to remedy the procedural deficiencies mentioned. Statements were made that Rimrock Canal Company is an unincorporated association composed of James Morrison, Dolly Morrison, Thomas Timbers, and Joe Morrison; and that Bernard Morgan, a former associate, quitclaimed his interest to James and Dolly Morrison. The letter also constitutes a notice of appeal. In it, appellant characterizes the refusal to grant the

right-of-way as arbitrary. It contends: (1) the Idaho Fish and Game Department and the Bureau of Sport Fisheries and Wildlife, who objected to the location of the pump site, can act only in an advisory capacity and have no jurisdiction in this matter; (2) the reclamation of 1,500 acres of land embraced in their desert land entries should have priority over maintaining a "semi" permanent duck blind; (3) the pump station would not interfere with hunting; (4) any negative effects created by the pump station would be offset by the crop residue from the reclaimed land which would benefit both waterfowl and upland game birds.

Appellant asserts that the pump site was selected because it was most feasible from an engineering standpoint in that: (1) the penstock covered the shortest possible distance across public lands; (2) the transmission lines would not mar the shoreline; and (3) detrimental dredging would not be required because the water was of sufficient depth. As to the suggested proposal to locate the site 1,000 feet to the north or south, it contends this would entail extensive dredging, would require an additional 1,000 feet of penstock on public lands, and the construction of a power transmission line along the shoreline.

In a further statement of reasons for appeal, appellant reiterates previous arguments and emphasizes that the pump site is aesthetically located because it is concealed from public view. It further contends

with respect to the pump site that: (1) the cove is not extensively used for recreational purposes; (2) it is a poor habitat for fish and wildlife; (3) the vegetation is sparse; (4) turbidity created by the pumps will be imperceptible; (5) the pump site would not have a deleterious effect on the shoreline; (6) the personnel who objected to the proposed location lack technical knowledge; (7) there are no other feasible sites; and (8) other pumping stations located on the reservoir and rights-of-way have been previously granted. It enclosed copies of the approved rights-of-way grants.

In addition to these objections to the denial of approval of the pump station site, appellant also raises a threshold issue as to whether he might construct the improvements without approval by Government officials. The short answer to this question based upon the facts in this case is that such an alternative is not available to appellant. This is evident because of the status of the land and applicable law.

As to the status of the land, prior to the date appellant's application was filed, the land was withdrawn as a power site. The administering agency of the power site reserve, the Federal Power Commission, has no objection to appellant's application. However, the site upon which the pumping station is planned, as has been indicated, has also been withdrawn "from all forms of appropriation under the public land laws * * * for management by the State of Idaho as part of the C. J. Strike

Wildlife Management Area * * *." Public Land Order No. 4153, 32 F.R. 2888 (February 15, 1967). The withdrawal order also provided for the issuance of leases, licenses, or permits and disposals but "only if the proposed use of the lands will not interfere with the proper management of the C. J. Strike Wildlife Management Area." *Id.*

The withdrawal for the wildlife management area was made in furtherance of the purposes of the Fish and Wildlife Coordination Act of March 10, 1934, *as amended*, 16 U.S.C. §§ 661-64 (1970), to provide equal consideration of wildlife conservation and coordination with other water-resource development programs. Under the Act (16 U.S.C. § 661) :

* * * the Secretary of the Interior is authorized (1) to provide assistance to, and cooperate with, Federal, State and public or private agencies and organizations in the development, protection, rearing, and stocking of all species of wildlife, resources thereof, and their habitat, in controlling losses of the same from disease or other causes, in minimizing damages from overabundant species, in providing public shooting and fishing areas, including easements across public lands for access thereto, and in carrying out other measures necessary to effectuate the purposes of said sections; * * *

The withdrawn status of the land places it within the ambit of the word "reservation" as used in the Act of March 3, 1891.¹ It is well established that there is no grant of

the right-of-way under the Act of March 3, 1891, as to withdrawn lands, without prior approval of the Secretary and subject to such conditions as he may impose. *Assistant Attorney General's Opinion*, 33 L.D. 563 (1905); *James W. McKnight et al.*, 13 L.D. 165 (1891).

In an early court case interpreting the Act of March 3, 1891, *United States v. Rickey Land and Cattle Company*, 164 F. 496, 500 (C.C.N.D.

the Act. Section 18 of the Act, as amended (43 U.S.C. § 946 (1970)) provides:

"That the right of way through the public lands and reservations of the United States is hereby granted to any canal ditch company, irrigation or drainage district formed for the purpose of irrigation or drainage, and duly organized under the laws of any State or Territory, and which shall have filed, or may hereafter file, with the Secretary of the Interior a copy of its articles or incorporation or, if not a private corporation, a copy of the law under which the same is formed and due proof of its organization under the same, to the extent of the ground occupied by the water of any reservoir and of any canals and laterals and fifty feet on each side of the marginal limits thereof, and, upon presentation of satisfactory showing by the applicant, such additional right of way as the Secretary of the Interior may deem necessary for the proper operation and maintenance of said reservoirs, canals, and laterals; also the right to take from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch: *Provided*, That no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and all maps of location shall be subject to the approval of the department of the Government having jurisdiction of such reservation; and the privilege herein granted shall not be construed interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories."

Section 19 of the Act of March 3, 1891, 43 U.S.C. § 947 (1970), requires the filing of a map for approval by the Secretary of the Interior. The regulations applicable to rights-of-way under the Act of March 3, 1891, 43 CFR Parts 2800 and 2870, contemplate official approval of the maps and location plans of the proposed rights-of-way before the grant under the Act may be effectual.

¹ Section 20 of the Act of March 3, 1891 (43 U.S.C. § 948 (1970)) makes applicable to corporations, individuals, or associations of individuals the right-of-way provided for irrigation purposes by sections 18 and 19 of

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Cal. 1908), where improvements had been constructed, it was stated:

* * * in order to acquire a right of way over public lands for canal and reservoir purposes under the act of which it forms a part, it is essential that the map of the location of the canal and the reservoir shall be approved by the Secretary of the Interior. Such approval is a condition precedent to the taking effect of the grant of right of way * * *.

In *Rickey* the lands were withdrawn for a reservoir site and the Secretary of the Interior refused to approve the maps filed by an irrigation company under the Act of March 3, 1891. The Court held that the company acquired no right or easement to the land in the absence of approval by the Secretary. Of a similar effect is *United States v. Henrylyn Irr. Co. et al.*, 205 F. 970 (D. Colo. 1912), involving lands in a national forest reserve. The Court specifically referred to the Act of March 3, 1891, in stating at 972:

* * * the legislative intent is manifest that as to these reserves, created as they are for a special purpose, no occupancy nor use thereof by private parties shall be permitted save upon the exercise of a discretion by the proper departments as to whether such use will interfere with the purposes of such reserve. U.S. v. Lee, 15 N.M. 382, 110 Pac. 607.

Furthermore, in any case where prior approval is requested, the Secretary may deny approval or condition approval upon reasonable conditions. Thus, in a case not involving a withdrawal, *United States ex rel Sierra Land & Water Co. v. Ickes*, 84 F. 2d 228 (D.C. Cir. 1936), cert. denied, 299 U.S. 562 (1936), the Court upheld the Secre-

tary of the Interior's refusal to approve a right-of-way under the Act of March 3, 1891, for a ditch and reservoir system where the State of California had refused the applicant a water right. The Court denied that there was an absolute right to the grant stating at 231:

The contention that the grant is one in praesenti, and therefore vests title in the applicant, irrespective of the approval by the Secretary of the Interior, cannot be sustained. So long as the exercise of the power of approval by the secretary is not unreasonable, or contrary to statutory mandates governing the allowance of rights of way for canals and reservoirs, the jurisdiction of the secretary to act under reasonable regulations respecting such grants cannot be controlled by the mandatory orders of the courts.

That a right of way grant in praesenti does not vest until approval of the application by the secretary has been determined by direct interpretation of the statutes under which appellant company claims its rights of way in the present case. * * *

In view of the foregoing discussion of the Act of March 3, 1891, and in view of the policies and requirements imposed by the Fish and Wildlife Coordination Act, it was imperative of the Bureau of Land Management officials to consult with and consider the recommendations of the Bureau of Sport Fisheries and Wildlife and the Idaho Fish and Game Department to assure conservation of the fish and wildlife together with appellant's proposed usage of the water resource before appellant's application could be approved.

The essence of appellant's objections to an alternative site for the

proposed pumping station is a disagreement as to the reasonableness of alternative sites in view of environmental and engineering considerations.

An investigative report by a Bureau of Land Management official states that the cove desired by appellants for its pumping station is the only cove on the east shore of the Bruneau arm of the reservoir. Its use for fish, wildlife, and recreational purposes has significant value. The Regional Director of the Bureau of Sport Fisheries and Wildlife indicated that the site is one of the few coves along the reservoir, and the coves contain fish spawning and rearing habitat and wildlife cover. He stated that a reduction in fish spawning area, already in short supply, would occur and young fish would be faced with a hazard at the pump intake, and cover vegetation for wildlife would be reduced if the pumping station were allowed in the cove site desired by appellant.

As indicated previously, Morrison and representatives of the State and the two Bureaus within this Department inspected the site together. His objections to the proposed alternative to the site were undoubtedly manifested at that time, but the alternative was determined to be better for the preservation of the fish and wildlife and over-all environment than locating the pumping station within the cove site. In view of the shortage of natural cove areas along the shoreline of the reservoir and the alternatives offered appellants, the denial of the application

as to the cove site is supported by reasonable grounds. Appellants have not shown clearly that the exercise of discretion in this matter is unfounded and arbitrary or capricious. As the decision was predicated upon due regard for the public interest in managing the wildlife area in light of the purposes of the Fish and Wildlife Coordination Act, it was a proper exercise of discretionary authority and is sustained. *Of. George S. Miles, Sr.*, 7 IBLA 372 (1972); *Clear Creek Inn Corporation*, 7 IBLA 200, 79 I.D. 571 (1972).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

JOAN B. THOMPSON, *Member*.

WE CONCUR:

DOUGLAS E. HENRIQUES, *Member*.

MARTIN RITVO, *Member*.

CLARK CANYON LUMBER COMPANY

9 IBLA 347

Decided *February 14, 1973*

Appeal from a decision by the Dillon, Montana, District Manager, Bureau of Land Management, unilaterally terminating appellant's timber sale contract no. 25050-TSO-05.

Affirmed.

Delegation of Authority: Generally—
Timber Sales and Disposals

February 14, 1973

Upon request of the State Director, a District Manager, Bureau of Land Management, who has authority to enter into timber sale contracts also has authority to terminate such contracts when to do so would be in the best interest of the Government.

Timber Sales and Disposals

Section 1 of the Act of July 31, 1947, *as amended*, 30 U.S.C. § 601 (1970) gives the Secretary the power to dispose of timber on the public lands if to do so would not be detrimental to the public interest.

National Environmental Policy Act of 1969: Environmental Statements—Timber Sales and Disposals

In accordance with guidelines provided by the Council on Environmental Quality, 36 F.R. 7724, detailed environmental statements are not required under section 102(2)(c) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4331(2)(c) (1970), in connection with the cancellation of a timber sale contract where it is not reasonable to anticipate a cumulatively significant adverse effect on the environment.

Rules of Practice: Hearings

In connection with Government cancellation of a timber sale contract, a request for a hearing will be denied where no facts are alleged which, if proved, would warrant granting the relief sought.

APPEARANCES: Leonard B. Netzorg, Esq., Portland, Oregon, for appellant.

OPINION BY MR. GOSS INTERIOR BOARD OF LAND APPEALS

Clark Canyon Lumber Company has appealed from a decision dated August 20, 1971, by the Dillion, Montana, District Manager which unilaterally terminated appellant's

timber sale contract no. 25050-TSO-05 because "this sale does not meet the criteria of the National Environmental Policy Act and its continuance is not in the best interest of the public."

In June 1970 timber in the Jones Creek watershed of the Centennial Mountain Range was advertised for sale by the Bureau of Land Management pursuant to the Act of July 31, 1947, *as amended*, 30 U.S.C. §§ 601-604 (1970). The timber sale contract was awarded to appellant as highest bidder, and the contract was approved on August 3, 1970. The contract area consisted of sixteen cutting units in the Jones Creek area. The total sale price was \$4,504.50 for an estimated 2145 mbf.

In July 1971, before appellant had taken any action on the contract, the Dillon District Manager informed the Montana State Director, Bureau of Land Management, that an inspection of the proposed cutting area revealed potentially serious problems which could arise from building roads and logging the area due to the proposed location of the roads and the extreme instability of the soils. He recommended that consideration be given to placing the timber sale contract under suspension.

By memorandum dated August 19, 1971, the State Director advised the Dillon District Manager that because of the environmental considerations it would be in the best public interest for the Bureau of Land Management to unilaterally terminate the contract.

The State Director also received a memorandum from the Chief, Division of Resources, Bureau of Land Management, on August 23, 1971, which set forth findings and recommendations following an August 5 inspection of the contract area. He found that road construction in several places would cause stream blockage; that an earth movement phenomenon existed in the area and disturbance would accelerate it; that natural reforestation was minimal and artificial reforestation had never been done in any areas logged in the past; that mistakes in layout had been made and to log the area in view of forest management's increased concern with environmental consequences would be disastrous and not in the public interest. He added that the State Office Forester, the State Office Recreation Planner and soil and watershed staff men from the Division of Resources visited the area and concurred in the findings.

The Chief, Division of Resources, recommended termination of the subject contract and that an intensive soil survey be undertaken in the whole Centennial area with a moratorium on future timber sales pending the outcome of the study. He stated that the Dillon District Manager had been advised to proceed with the termination on August 12, 1971.

The Dillon District Manager, acting upon the request of the Montana State Director, issued his decision unilaterally canceling the timber sale contract on August 20, 1971,

and recommending that all moneys paid by appellant be refunded.

On appeal, appellant has made the following arguments:

(1) The officer who sought to terminate the contract lacked authority to do so.

(2) The contract should be performed, and the Board should direct specific performance of the contract.

(3) The Government's evaluation of the environmental consequences of timbering the contract area was wrong and in any event, the decision to terminate the contract was invalid because the Bureau failed to follow the requirements on the National Environmental Policy Act and the guidelines issued by the Council on Environmental Quality.

(4) The contract should be amended by eliminating the cutting areas about which there is environmental concern and by substituting other areas which would insure appellant a comparable volume of timber without an increase in cost. Appellant would assent to a substitution of other areas in lieu of cutting units 4, 5, 6, 14, 15 and 16.

(5) The Government's purported termination of the contract occurred while appellant was negotiating a sale of all its assets and the Government knew that its action would cause appellant extraordinary harm.

The authority to enter into a government contract carries with it the power to terminate the contract when it appears that such action would be in the best interest of the Government. *Cf. United States v. Corliss Steam Engine Co.*, 91 U.S. 321 (1875); *cf. 29 Comp. Gen.* 36 (1949). The decision to terminate and the propriety of the termination are matters for administrative determination. *18 Comp. Gen.* 826 (1939). While the power to terminate is inherent, there is also a duty

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to compensate the contractor when the Government has acted unilaterally. Such a termination, in the absence of a statute or contract clause establishing the rights, is a breach of contract for which the contractor is entitled to damages. *United States v. Purcell Envelope Co.*, 249 U.S. 313 (1919). In the absence of a statute so authorizing, specific performance is not a judicial remedy available against the Government. *United States ex rel. Shoshone Irr. Dist. v. Ickes*, 70 F.2d 771 (D.C. Cir. 1934), *cert. denied*, 293 U.S. 571 (1934).

Appellant contends that the Dillon District Manager who terminated the timber sale contract, involved herein, lacked authority to do so. In 43 CFR 5400.0-5 "authorized officer" is defined as "an employee of the Bureau of Land Management to whom has been delegated the authority to take action" on timber sale contracts. The authority to contract for the sale of timber and to administer timber sales was delegated to the state directors and district managers by Bureau Order No. 701, dated July 23, 1964 (29 F.R. 10526). Thus the State Director and District Manager are "authorized officers and as such they have the power to terminate a contract when such is in the best interests of the Government. See *Irvin Pearce d/b/a Pearce Bros.*, 5 IBLA 373 (1972).

Having found that the Dillon District Manager was not acting outside the scope of his authority in unilaterally terminating the timber

sale contract, we must ascertain whether the action herein was justified as being in the public interest. Section 1 of the Act of July 31, 1947, *as amended*, 30 U.S.C. § 601 (1970) grants to the Secretary of the Interior the power to dispose of timber on the public lands subject to the limitation that disposal should not be made if to do so would be detrimental to the public interest.

The District Manager's decision stated that the sale did not meet the criteria set out in the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* (1970). In section 101 of the Act, 42 U.S.C. § 4331 (1970), Congress declared the policy of the federal government to be to foster and promote the general welfare and to create and maintain conditions under which man and nature can coexist in productive harmony. In the same section Congress said that:

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

The decision to unilaterally terminate the contract was made only after the contract area was inspected by the Dillon District Manager, the Dillon District Forester, personnel from the State Office, Division of Resources, the State Office Forester and the State Office Recreational Planner. All were in agreement that logging in the area would not be in the best public interest because of the potential hazards of erosion and stream pollution.

In addition, on October 22, 1971, the Acting Director of the Geological Survey filed a report with the Director, Bureau of Land Management, evaluating the probable effects of timbering on slope stability in the Centennial Mountains. The evaluation cited three ways in which timber harvesting could be expected to adversely affect the stability of the slopes in the Centennial Mountains:

(1) Road construction in unstable areas could cause mass wasting.

(2) Timber harvesting would result in higher soil moisture in the cut area which in turn would increase the possibility of land slides.

(3) Decaying tree roots following timber harvesting would reduce soil stability.

The report also stated that logging in the Price Creek and Peet Creek watersheds resulted in mass wasting and land sliding and that a similar phenomenon could be expected in Jones Creek if road construction and logging were initiated there.

The report recommended that considerable thought be given to the wisdom of logging any area in the Centennial Mountains because of

the obvious threat to the environment.

A rather extensive soil inventory study of the Centennial Mountain area was filed with the State Director, Montana, by two soil scientists on November 12, 1971. The study delineated safeguards which would be necessary to reduce the environmental impact of building roads and logging in the area. The study included a topographical map color keyed to soil associations. The soils in the contract area present severe to moderate limitations on road construction.

These two reports, filed subsequent to the District Manager's decision, support his action in terminating the contract.

Appellant filed a geological inspection report with his statement of reasons. The report was compiled for the Dillon, Montana, Chamber of Commerce by William J. McMannis, geologist. Mr. McMannis spent one day investigating the contract area. He concluded that of the sixteen cutting areas six were located in areas in which it would be "risky" to construct roads. But he saw no geological reason why the Jones Creek area should not be logged as the Bean Creek and Price Creek areas had been.

A memorandum from the State Director, Montana, to the Director, Bureau of Land Management, dated October 22, 1971, explained the McMannis report. The State Director felt that Departmental experience in previous logging of the geologically similar areas of Jones and Peet

Creeks did not justify logging the Jones Creek area.

The information in the record concerning the environmental considerations of logging the Jones Creek watershed weigh heavily in favor of the action taken by the District Manager. The record supports the conclusion that logging the contract area would be inconsistent with national environmental policy; would not be good forest management in light of increased environmental concern; would be contrary to the goal of promoting efforts to prevent or eliminate destruction of the environment; and, therefore, would not be in the best public interest.

There is no validity to appellant's argument that the Government's action in terminating the contract was invalid because the Government did not conform to the requirements of the National Environmental Policy Act and the guidelines of the Council on Environmental Quality. We assume appellant is referring to section 102 of the Act, 42 U.S.C. § 4332 (1970) which reads in part:

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts.

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the in-

tegrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

* * * * *

(C) includes in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

* * * * *

Under part (2) (C) of section 102, the compilation of an environmental impact statement is required only in connection with legislation and other major federal actions significantly affecting the quality of the human environment. The section has been used most often by environmental groups to force governmental agencies to consider the environmental impact of proposed agency action, *e.g.*, *Environmental Defense Fund, Inc., v. Corps of Engineers*, 325 F. Supp. 749 (D.C. Ark. 1971). The usual charge is that the agency has not taken adequate consideration of the impact of its action on the environment.

The Council on Environmental Quality has set forth guidelines, 36 F.R. 7724, to be used in deciding whether a proposed action requires an environmental statement—

5. *Actions included.* The following criteria will be employed by agencies in deciding whether a proposed action requires the preparation of an environmental statement:

(a) "Actions" include but are not limited to:

(i) Recommendations or favorable reports relating to legislation including that for appropriations. * * *

(ii) Projects and continuing activities: directly undertaken by Federal agencies; supported in whole or in part through Federal contracts, grants, subsidies, loans, or other forms of funding assistance; involving a Federal lease, permit, license, certificate or other entitlement for use;

(iii) Policy, regulations, and procedure-making.

(b) The statutory clause "major Federal actions significantly affecting the quality of the human environment" is to be construed by agencies with a view to the overall, cumulative impact of the action proposed (and of further actions contemplated). * * *

In this case the Bureau of Land Management realized, after the contract was entered into, that the cutting of timber in the contract area would not be in the best public interest because of the potential detrimental environmental consequences of the action. As administrator of the public lands, the Department is obligated to consider such environmental consequences.

While we realize that the unilateral termination of a government contract is a serious matter, affecting vested contractual rights of a

timber purchaser, we cannot interpret the National Environmental Policy Act as requiring the filing of an environmental impact statement under the facts herein. In *Environmental Defense Fund v. Hardin*, 325 F. Supp. 1401, 1403 (D.C.D.C. 1971) it is recognized that the requirements of section 102 part (2) (A) "should be judged in light of the scope of the proposed program and the extent to which existing knowledge raises the possibility of potential adverse environmental effects." The same standard applies to section 102 part (2) (C) under the Council on Environmental Quality guidelines, *supra*. An environmental impact statement is not required unless it is reasonable to anticipate a cumulatively significant adverse impact on the environment from Federal action.

Appellant has not alleged that cancellation of the contract would have any potential adverse effect on the environment, therefore, it is not necessary to determine whether the cancellation would constitute a major Federal action.

Appellant also argues that the Government should amend the contract, and he represents that he would agree to a deletion of cutting units nos. 4, 5, 6, 14, 15, and 16, if areas yielding equal volumes of timber could be substituted. It is not necessary that such proposals be discussed herein. Appellant's evidence seems to concede that six of the sixteen units should not be logged, and he conditionally proposes their deletion from the contract. 43 CFR

5401.0-6 provides that all timber sales "other than those specified in § 5402.0-6 shall be made only after inviting competitive bids." Under such facts it was neither arbitrary nor an abuse of discretion for the District Manager to terminate rather than substantially amend the contract. *See Kerr McGee Corporation et al.*, 6 IBLA 108 (1972).

As to appellant's request for a hearing, the only question before the Board is whether there is a sound basis for the judgment that was exercised. Under 43 CFR 4.415 the ordering of a hearing is within the discretion of the Board. There being no factual dispute as to the premise that six of the units should not be logged, and that deletion of and substitution for the six units would substantially change the contract, the Board concludes as a matter of law that the District Manager acted within his discretion in rescinding rather than substantially modifying the contract. There being no facts alleged which would alter this conclusion, the request for a hearing should be denied. *Leo J. Kottas, Earl Lutzenhizer*, 73 I.D. 123 (1966); *Harold E. and Alice L. Trowbridge*, A-30954 (January 17, 1969).

Appellant has further charged that the Government inflicted extraordinary harm by terminating the contract when it had knowledge that appellant was negotiating a sale of its assets. Such an argument does not go to the merits of this appeal. If appellant is attempting to infer a wrongful intent on the part of the

Government, the argument is best espoused in a suit for damages.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the Government's motion to dismiss is denied and the decision appealed from is affirmed.

JOSEPH W. GOSS, *Member*.

WE CONCUR:

MARTIN RITVO, *Member*.

EDWARD W. STUEBING, *Member*.

ASA V. PERKES

9 IBLA 363

Decided February 14, 1973

Appeal from a decision of the Idaho State Office, Bureau of Land Management, rejecting appellant's color of title applications, I 4369 and I 4370.

Reversed and remanded.

Words and Phrases

"Grantor". The word "grantor" as used is the Color of Title Act, 45 Stat. 1069 (1928), *as amended*, 43 U.S.C. § 1068 (1970), means a person by whom a grant is made, grant being a generic term applicable under the statute to all transfers of real property, including devises and transfers by operation of law.

Color or Claim of Title: Generally

Under the Color of Title Act, 45 Stat. 1069 (1928), *as amended*, 43 U.S.C. § 1068 (1970), an applicant's period of adverse possession may commence at a time when title to the land is being held by a state pursuant to the provisions of the Carey

Act, 28 Stat. 422 (1894), *as amended*, 43 U.S.C. §§ 641 *et seq.* (1970).

Color or Claim of Title: Generally

The period of possession of a color of title claim, having been initiated when the land was subject to appropriation under the public land laws, is not interrupted by a subsequent period of time during which the land was not open for appropriation.

APPEARANCES: William G. Carlson, Esq., Arco, Idaho, for appellant.

OPINION BY MR. GOSS INTERIOR BOARD OF LAND APPEALS

Appellant has appealed from an Idaho State Office, Bureau of Land Management, decision dated June 30, 1971, rejecting his class 1 color of title applications, I 4369 and I 4370, for two 40-acre tracts of land in Butte County, Idaho. The decision held that at the time of initiation of the color of title claims the land was not vacant, unappropriated, unreserved public land subject to the public land laws. No ruling was made as to whether appellant complied with the other requirements of the Color of Title Act.

The land involved in this appeal was patented to the State of Idaho under the provisions of the Carey Act, 28 Stat. 422, *as amended*, 43 U.S.C. §§ 641 *et seq.* (1970), on July 31, 1923. The Carey Act provided for the donating, granting and patenting of desert lands to a state that complied with the requirements of the Act. The purpose of the Act was to promote the reclama-

tion of desert lands and the State **was not authorized** to lease any of the lands, or to use or dispose of them in any manner, except to secure their reclamation, cultivation, and settlement.

A Carey Act project involving the lands in issue was commenced but not completed. By deed dated September 4, 1942, the State of Idaho reconveyed the lands to the United States. However, the lands were not available for appropriation under the public land laws until provisions for the opening of such lands were made by Bureau of Land Management order, Misc. 55843, dated March 30, 1950.

The pertinent part of the Color of Title Act, 45 Stat. 1069, *as amended*, 43 U.S.C. § 1068 (1970), reads as follows:

The Secretary of the Interior (a) shall, whenever it shall be shown to his satisfaction that a tract of public land has been held in good faith and in peaceful, adverse, possession by a claimant, his ancestors or grantors, under claim or color of title for more than twenty years, and that valuable improvements have been placed on such land or some part thereof has been reduced to cultivation, * * * issue a patent for not to exceed one hundred and sixty acres of such land upon the payment of not less than \$1.25 per acre: * * *

This type of claim is designated by 43 CFR 2540.0-5(b) as a class 1 claim.

The basis for appellant's color of title claims are two tax deeds executed in 1937 by Butte County, Idaho, in favor of appellant's predecessors in interest. The State Office decision held that adverse posses-

sion could not have begun to run against the United States in 1937 because the State of Idaho owned the lands. Appellant argues that adverse possession was initiated in 1942 when the State of Idaho re-conveyed the lands to the United States.

A question exists in connection with application I 4369. The origin of the claim in that application was a tax deed to A. R. Babcock in 1937. By probate decree of distribution the subject land passed to Maude E. Babcock. May A. R. Babcock be considered one of appellant's "grantors" under the Color of Title Act, 43 U.S.C. § 1068 (1970)? The courts have interpreted "grant" broadly to include a devise. *Commissioner of Internal Revenue v. Plestcheeff*, 100 F. 2d 62 (9th Cir. 1938), as well as transfers by operation of law, *White v. Rosenthal*, 35 P. 2d 154 (1934). The term "grantor" is defined in Black's Law Dictionary 829 (4th ed. 1951) as "the person by whom a grant is made"; "grant" being defined as "a generic term applicable to all transfers of real property." These interpretations coupled with the fact that the Color of Title Act is remedial and to be liberally construed, *Harry H. Scott and Nion R. Tucker*, A-15425 (April 10, 1933), make it clear that A. R. Babcock may be considered a grantor within the meaning of the Color of Title Act.

Even though the lands were owned by the State of Idaho in 1937, such is not a bar to the incep-

tion of the color of title claims. The Department stated in *Harry H. Scott and Nion R. Tucker, supra*, that:

In the decision appealed from it was held that in the requirement of adverse possession for at least 20 years, the law contemplates that the possession must be of public lands, as such, for that length of time, and that the requirement of the law is not met where the land had the status of private land for a portion of that period. The Department regards this as an extreme and harsh interpretation. The act is remedial in nature and should be liberally construed. The interpretation complained of is not only not liberal but is actually strained and unnatural. We are authorized to sell only public land, but if the land be public at this time it is immaterial to the purpose of the act that the land may have been claimed or held in private ownership during a portion of the required 20-year period of possession. Furthermore, while this land may be regarded in a technical sense as having been in private ownership under the patent to the railroad company, nevertheless the Government had such interest in it as to justify resumption of the legal title in order to enforce the purpose of the original grant.

Appellant's period of good faith holding began to run in 1937 and continued until 1969 when appellant learned he did not have good title to the land. Even though a color of title claim could not have been initiated between 1942 and 1950 when the lands were not open to appropriation under the public land laws, such intervening period cannot now operate to defeat appellant's color of title claims. The 1942-50 period is somewhat analogous to a period of withdrawal. Clearly, a color of title claim could

not be initiated upon withdrawn or reserved lands. 43 CFR 2540.0-5 (b); *Margaret C. More*, 5 IBLA 252 (1972); *Palo Verde Color of Title Claims*, 72 I.D. 409 (1965); *Claude M. Williams, Jr., et al.*, A-29928 (March 26, 1964). However, if a color of title claim arose before a withdrawal of the lands, the withdrawal would not preclude perfection of the claims under the Color of Title Act. *Clement Vincent Tillion, Jr.*, A-29277 (April 12, 1963).

The subject lands are presently public lands, having been restored to that status by the 1950 order. The definition commonly assigned to "public lands" is those lands subject to sale and disposition under the general laws. *Borax Consolidated, Ltd., et al. v. Los Angeles*, 296 U.S. 10, 17 (1935). Appellant has fulfilled the requirement of holding a tract of public land in adverse possession for more than twenty years.

Applications I-4369 and I-4370 show that Asa V. Perkes took title as "Asa V. Perkes, et ux." Therefore, appellant should be required to amend his applications to include as applicants his wife or her successors in interest or file on record any relinquishment of her interest in the lands.

If appellant has fulfilled the other requirements, patents should issue. The July 23, 1953, amendment, 67 Stat. 227, to the Color of Title Act, *supra*, makes the issuance of a patent by the Secretary to a class 1 claimant mandatory if it is found that the conditions prescribed in the statute are met.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the case is remanded for appropriate action consistent with this decision.

JOSEPH W. GOSS, *Member*.

WE CONCUR:

FREDERICK FISHMAN, *Member*.

ANNE POINDEXTER LEWIS, *Member*.

FLACID OIL COMPANY

9 IBLA 384

Decided February 16, 1973

Appeal from a decision of the New Mexico State Office, Bureau of Land Management, denying offers for future interest oil and gas leases, unless evidence of a continued control over the operating rights by applicant is submitted within 30 days.

Affirmed, as modified.

Oil and Gas Leases: Future and Fractional Interest Leases

Where an applicant for a future interest oil and gas lease of acquired lands has interests only in the land below 1,000 feet below the surface, it does not own or control all or substantially all of the present operating rights to the minerals in the land; if it seeks only a lease for the zone below 1,000 feet, it is requesting a lease of a horizontal zone, which is granted, if at all, only where the need for it is clear and convincing; in either case its offer for a future interest lease must be rejected.

APPEARANCES: Walter Fraker, for Placid Oil Company; Gayle E. Manges, Field Solicitor, for Department of the Interior.

*OPINION BY MR. RITVO
INTERIOR BOARD OF LAND
APPEALS*

Placid Oil Company has appealed from a decision¹ by the New Mexico State Office, Bureau of Land Management, denying future interest oil and gas lease applications NM A-10938, NM A-10940 through NM A-10943, unless Placid Oil Company submits evidence within 30 days to demonstrate its continued control over the operating rights between the expiration date of the primary term of its lease, May 28, 1974, and the date the mineral interest will vest in the United States, January 2, 1985.

Placid Oil Company filed future interest offers on December 10, 1969, for lands located in the Sabine National Forest in Texas. The records show that the United States acquired title to the lands by warranty deed dated December 27, 1935, subject to a reservation by the grantor of all the minerals until January 1, 1985, to be extended in the event of commercial production.

¹ The December 23, 1971, decision covered offers NM-A-10937 through 10939. The January 3, 1972, decision modified the December 23, 1971, decision in that it required a further certificate of title for offers NM-A-10937 and NM-A-10939, certifying the mineral interest outstanding *only* in these two tracts; the earlier decision had required a further certificate of title, as required by regulation 43 CFR 3130.4-5, for all the offers. These two offers are not involved in this appeal.

By "Oil and/or Gas Lease" Agreement dated May 27, 1969, Temple Industries, Inc., successor to the mineral interests in the land, granted to Placid Oil Company an oil and gas lease for lands below 1,000 feet below the surface for a period of five years. Concerning the possibility of extension of the period of rental, in a letter of January 18, 1972, to the Bureau, applicant stated:

At the time applicant acquired its present lease covering the present mineral interest, we were unable to negotiate for a primary term longer than 5 years. Based upon our prior negotiations with the owner of the present mineral interest, we doubt that we would be successful in renewing the present lease upon the expiration of its primary term for a term of more than five years.

Appellant thus in essence admits that absent production, it will not have continued ownership or control of operating rights to the present mineral interests, between the expiration date of May 28, 1974, and January 2, 1985. However, citing *Clare Davis Pickens*, Colorado 0109978, November 15, 1963, appellant argues that the policy of the Bureau of Land Management in issuing future interest leases should encourage further resource development. Therefore, appellant argues, since he cannot operate beyond the 1974 lease date, he will be discouraged from now attempting to develop the land for oil and gas. Since his future interest lease rights would not vest unless he produces oil, appellant further argues, the Government will have nothing to

lose by granting a future interest lease.

The State Office's decision denying the applications was based on 43 CFR 3130.4-5. Citing *Smead Stewart*, BLM A-047789-92 (May 8, 1961), the State Office decided that since Placid did not have continued control over the operating rights between the expiration date of the primary term of its lease and the date the mineral interest would vest in the United States, its applications for future interest leases should be rejected.

We believe the Bureau's ruling should be upheld, but on a different ground. 43 CFR 3130.4-5 dealing with future interest offers states:

(a) *Application*. A noncompetitive lease for a whole or fractional future interest will be issued only to an offeror who owns all or *substantially all* of the present operating rights to the minerals in the lands in the offer as mineral fee owner, as *lessee* or as an operator holding such rights. * * * (Italics added)

Without deciding whether Placid would otherwise qualify as an applicant, we find the requirement that an offeror own or lease—"all or substantially all" of the present operating rights disqualifies Placid since the lease granted by Temple to Placid gives rights to oil and gas exploration only below 1,000 feet.

We note that Placid's offer was not limited to the zone covered by its lease from Temple. Such partial ownership does not constitute substantially all of the present operating rights in the lands in the offer, as required by the regulation.

The Department's disapproval of leasing future or fractional interests where the applicant does not own substantially all of the present operating interests is based upon the concept that any leasehold should have a continuity of term. *Fritz, Mineral Problems Relating to Acquired Lands*, 3 Rocky Mt. Min. L. Inst. 379, 385 (1957). To give Placid a future interest lease for the first 1,000 feet would violate this practical policy, since it has no present operating rights for that zone.

Even if the "ownership" required by the regulation were to be considered as applying only to the rights Placid has, that is, those below 1,000 feet from the surface, a lease granting such rights to it would be a lease of a separate horizontal zone. While there are no specific prohibitions against such leasing in the law or regulations, the practice has been "most uncommon in the Department." *Clear Creek Inn Corporation*, 7 IBLA 200, 202, 79 I.D. 571 (1972).

However, as that case points out, the Secretary may approve assignments of a separate zone or deposit in an existing oil and gas lease. The Mineral Leasing Act so provides, 30 U.S.C. § 187(a); but the pertinent regulation states that such an assignment will not be approved unless the necessity therefor is established by clear and convincing evidence. 43 CFR 3106.3-2.

Applying this standard, to Placid's request for future interest leases, we can find no necessity for creating leases of a separate zone.

February 22, 1973

On the other hand, if Placid seeks leases as to all the lands without zonal separation, it does not, as we have noted above, own substantially all of the present operating rights to the lands in the offer. In either case, its offers must be rejected.

Since the appellant's offers must be rejected, the State Office decision is modified by removing the possibility that it could qualify by submitting the evidence that decision held necessary.

This decision, however, is not to prejudice applicant from reapplying for a future interest lease in conjunction with the continuing owner of the mineral interest (Temple), or upon its own acquisition of that interest.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

MARTIN RITVO, *Member*.

WE CONCUR:

FREDERICK FISHMAN, *Member*.

ANNE POINDEXTER LEWIS, *Member*.

LYNN E. ERICKSON

10 IBLA 11-317

Decided *February 22, 1973*

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting appellant's application

to purchase and canceling headquarters site claim Anch. 064010.

Affirmed.

Alaska: Headquarters Sites

An application for a headquarters site for a commercial fishing operation must be rejected where the applicant fails to show that he is using the site in connection with a productive industry as required by law at the time he filed his application to purchase. The term "productive industry" is not so broad as to include within its meaning an operation such as the applicant's endeavor, where the applicant admits that he was actively engaged in fishing operations for only the first season after the claim was initiated, the gross receipts from the operation were meager, and the enterprise was discontinued and the boat sold.

APPEARANCES: Lynn E. Erickson, pro se.

OPINION BY MR. STUEBING INTERIOR BOARD OF LAND APPEALS

Lynn E. Erickson appeals from a decision of the Alaska State Office, issued February 3, 1972, rejecting his application to purchase a headquarters site filed pursuant to the Act of March 3, 1927, 44 Stat. 1364, *as amended*, 43 U.S.C. § 687a (1970). The rejection was based upon a finding that Erickson had not shown in his application to purchase that he was using the land as his headquarters for a productive industry as required by law. In this decision, the State Office also canceled the appellant's claim because

he had failed to file an acceptable application to purchase before the expiration of the statutory life of the claim.¹

Appellant filed his notice of location on November 29, 1965, for a site comprising five acres of unsurveyed land located on an island in Lake Iliamna. The Bureau of Land Management acknowledged the claim on January 14, 1966. Appellant filed his application to purchase and petition to survey on September 28, 1970. He described the nature of his business as a commercial fishing (salmon) operation which included drift gill netting and shore set netting on both a personal and partnership basis. Appellant explained that the location of this site was particularly advantageous to his operation because Lake Iliamna has a direct water route to the commercial fishing grounds on Bristol Bay which serves to eliminate a high-cost portage from Cook Inlet to Pile Bay.

Improvements on the site included a 12 x 16 foot cabin having a frame construction and metal roof, fish rafts, an outhouse, and a garbage pit. Appellant estimated the total value of these improvements at \$800. Included with the application to purchase were copies of his 1966 commercial fishing gear and vessel licenses and copies of receipts from the sale of fish to

Kayler-Dahl Fish Company, Inc. Appellant admits that these are the only available records in regard to his business.

Appellant states that he and his brothers engaged in fishing operations in 1966. Although some fish was sold to Kayler-Dahl Fish Company that year, the operation was not a profitable venture. They suspended operations in 1967 because they could not contract with a buyer. They did, he says, use the site for storing equipment. In 1968, licensing regulations and lack of a buyer precluded operations. In 1969, appellant secured gear and a license and had a potential buyer. When this buyer refused to sign a written contract, appellant terminated his fishing activities. The following year, he and his brothers dissolved the partnership and sold the boat.²

The State Office decision rejected the application because appellant did not show that he was using the site in connection with a productive industry at the time of filing his application to purchase. The following observations were noted in the decision. The field examination report stated that the improvements were built by local residents in the summer of 1970 and that the residents said they had no knowledge

² From appellant's account of his business, it is unclear how he terminated his connection with the partnership. In a letter to the Bureau of Land Management dated December 22, 1971, appellant states that the partnership was dissolved and the boat sold the previous year. In his appeal, dated February 25, 1972, appellant says that the interests which he had held in the partnership at the time he filed his application to purchase, were subsequently sold and transferred as of the date of the appeal.

¹ The State Office erred in stating that appellant's claim expired on September 28, 1970. The correct expiration date was November 29, 1970. Since appellant's application to purchase was filed on September 28, 1970, he has met the time requirement of the law. 43 CFR 2563.1-1 (10) (c).

of Erickson's use of the land; Receipts from the sale of fish were signed by appellant's brother; Erickson admitted that he did not engage in fishing after 1966; The headquarters site settlement claim is located some 190 miles from the area where appellant last engaged in his commercial fishing venture in 1966.

Erickson filed a timely appeal in which he contends that he had taken the necessary steps to show compliance with the Act and that he had been engaged in a productive industry at the time of filing his application to purchase. He further alleges that the State Office's observations as set forth above create erroneous inferences.

The main issue for determination is whether appellant is qualified to purchase the site for use in connection with a productive industry within the meaning of the Act and regulations issued pursuant to the Act.

43 U.S.C. § 687a (1970) states that a citizen of the United States who is engaged in a trade, manufacture, or other productive industry may purchase one claim, not exceeding five acres, of unreserved public lands as a headquarters site under the rules and regulations prescribed by the Secretary of the Interior.

43 CFR 2563.1-1 states, among other requirements, that the applicant must show the actual use of the land for which he is applying and the nature of the trade, business, or productive industry.

The burden is on appellant, as the applicant for patent to land, to present evidence which shows compliance with the law and the regulations. *Lee S. Gardner*, A-30586 (September 26, 1966). The Government is not required to submit evidence to refute the evidence of the appellant, as Erickson implied in his appeal. Appellant contends that since he has submitted maps, records, photographs, and an explanation of his operation, he has met the requirements of the Act and the regulations. However, these materials do not prove that appellant was engaged in a productive industry when the application was filed. Conversely, appellant concedes in a letter to the Bureau on December 22, 1971, that he was not engaged in commercial fishing after 1966 because he was unable to contract with a buyer.

Except for the income derived from the sale of fish in 1966 to Kayler-Dahl Fish Company, Inc., appellant offers no evidence of revenue from his fishing activities. He admits that his venture was a loss. He contends that the State Office inferred that the operation was fictitious because his brother signed the receipts for the sale of the fish to Kayler-Dahl. Regardless of who signed the receipts, they do not show a sufficient amount of income to indicate a going operation. The term "productive industry" cannot be construed so broadly as to include within its meaning an enterprise of such short duration with such meager gross receipts as appellant's

operation. *Lee S. Gardner, supra*. Although the law does not require that an applicant show that his operation was profitable, some trade is a necessary indication of a productive industry. *Kathleen M. Smyth*, 8 IBLA 425 (1972); *Lee S. Gardner, supra*; cf. *James E. Allen*, A-30085 (February 23, 1965).

Appellant does not show that he resumed fishing activities after 1966; nor has he proved that he was engaged in a productive industry at the time he filed his application to purchase.³ Use of the site in connection with a productive industry at the time the application is filed is critical to the issuance of a patent and failure to prove such use precludes the granting of patent. Appellant states that his partnership was still in effect on the day he filed his application, although it was subsequently dissolved. However, this partnership agreement, by itself, does not constitute a trade, manufacture or productive industry.

The inferences which appellant contends are erroneous in the State Office's decision have no effect upon the holding that the application must be rejected. The decisive issue in this case is whether appellant has proved that he was using the site in connection with a productive industry at time of application. This he has failed to prove. It is of no consequence who built the improvements if it cannot be shown that

they were used in connection with a going operation; nor does it matter whether the residents of the locality had knowledge of appellant's use of the land. It is also of no significance that the site was located 190 miles from the principal area of commercial fishing. We do not deny the possibility that appellant could have used the site in connection with the conduct of commercial fishing operations at that distance, but the fact remains that he was not engaged in any productive commercial endeavor involving the use of the site after the first year. This conclusion is not a disputed fact, being based on his own statements made in conjunction with his application to purchase. It is therefore not a matter for determination at a hearing.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1; the decision appealed from is affirmed.

EDWARD W. STUEBING, *Member*.

WE CONCUR:

DOUGLAS E. HENRIQUES, *Member*.

JOSEPH W. GOSS, *Member*.

USE OF TERM "DELEGATION" IN
SOLICITOR'S OPINION, M-36803,
77 I.D. 50 (1970)

Indian Tribes: Generally—Words and
Phrases—Secretary of the Interior

"*Delegation*." The use of the term "delegation" in Solicitor's Opinion, M-36803,

³ At all times from the inception of the claim Lynn E. Erickson's address of record has been Bismarck, North Dakota, where, correspondence indicates, he serves that State as Assistant Attorney General.

M-36803. 77 I.D. 50 (1970)

February 22, 1973

77 I.D. 50 (1970), interpreting 25 U.S.C. § 48 allowing Indian tribes to " * * * be given * * *" direction over Federal employees, does not add substances to the argument that the statute is an unconstitutional delegation of authority prohibited by *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

M-36803 (Supp.)

February 22, 1973

OFFICE OF THE SOLICITOR

June 15, 1971

TO: COMMISSIONER OF INDIAN AFFAIRS.

SUBJECT: USE OF TERM "DELEGATION" IN SOLICITOR'S OPINION, M-36803, 77 I.D. 50 (1970).

A question has been raised whether the use of the term "delegation" throughout the April 3, 1970, *Solicitor's Opinion*, M-36803, 77 I.D. 50 (1970), places the conclusions of that opinion in jeopardy of violation of the constitutional doctrine against delegation of governmental authority enunciated in *Schechter Poultry Corporation v. United States*, 295 U.S. 495, 537 (1935).

The statute construed in that opinion, R.S. § 2072, 25 U.S.C. § 48, provides that direction of Federal employees may be "given" to the proper trial authority. I do not regard the use of the term "delegation" instead of the precise term used in the Act, "given", to place

the substance of the opinion in jeopardy of violation of the *Schechter* doctrine. Though there may be some semantic difference in these terms, the substance of the opinion was to construe authority conferred on the Secretary.

The object of R.S. § 2072 was to authorize Indian tribes, in the discretion of the Secretary, to direct the performance of duties by certain Federal employees. Whether the conferment of such authority on a tribe is regarded as congressionally authorized "redelegation" as in *O'Neal v. United States*, 140 F. 2d 908 (6th Cir. 1944) (see footnote 3 of our opinion) to an Indian tribe as an instrumentality of the Federal Government (see 59 I.D. 328 (1946)), or as implementation of authority conferred directly on tribes by the Congress would not, in my opinion, make action taken pursuant to the Act susceptible to successful attack as being in violation of the *Schechter* doctrine.

The *Solicitor's Opinion*, M-36803, *supra*, sets out the authorities which may not be regarded as permitted under R.S. § 2072 in any arrangement with an Indian tribe in directing the performance of Federal employees. Those exceptions are outside the scope of the Act and not subject to inclusion in any direction the tribe is permitted to exercise.

MITCHELL MELICH,
Solicitor.

EFFECT OF 28 U.S.C. §§ 2415 AND 2416 ON ACTIONS BROUGHT BY UNITED STATES FOR BENEFIT OF INDIANS AND ACTIONS BROUGHT BY INDIVIDUAL INDIANS OR INDIAN TRIBES

Indian Lands: Generally—Indian Tribes: Generally—Indians: Civil Jurisdiction

The provisions of the Act of July 18, 1966, 28 U.S.C. §§ 2415 and 2416, limit the time in which the United States may file suits on behalf of Indians and Indian tribes which seek any of the remedies specified in the Act. The Act does not apply to suits brought by tribes or individuals without the assistance of the Federal Government, but such suits, unless they are to quiet title to trust or restricted land, are subject to the statute of limitation applicable generally.

M-36861 *February 22, 1973*

**OFFICE OF THE SOLICITOR
INDIAN AFFAIRS**

January 20, 1972

**TO: ALL REGIONAL SOLICITORS—
ALL FIELD SOLICITORS.**

**SUBJECT: 28 U.S.C. §§ 2415 and
2416.**

Questions concerning the effects of §§ 2415 and 2416 of Title 28 on actions brought by the United States for the benefit of Indians and on actions brought by Indian individuals or tribes have from time to time been presented to this office.

For the guidance of the BIA offices which you serve, we have pre-

pared the following which we hope simplifies the provisions of the Act.

The provisions of the Act of July 18, 1966, 28 U.S.C. §§ 2415 and 2416, limit the time in which the United States may institute litigation seeking those remedies specified in the Act. In our view, the limitations apply to suits brought by the United States on behalf of individual Indians or an Indian tribe (or where the United States Attorney acts as plaintiff's counsel for the individual or tribe) if the suits seek any of the specified remedies.

The Act does not cover suits brought by tribes or individuals without the assistance of the United States. Since, however, Indians can no longer rely on the immunity of the United States from statute of limitation defenses, the Act indirectly affects the filing of such actions because they would be subject to those limitations applicable generally, except in cases to quiet title to trust or restricted lands.

The following are specific categories covered by the Act which we believe relevant to Indians. The statutory period begins to run as of the date of the Act or on which the action accrues, whichever is later.

**(1) ACTIONS FOR DAMAGES
FOUNDED ON A CON-
TRACT, EXPRESS OR IM-
PLIED—SIX YEARS.**

This provision would cover situations where the government would seek monetary compensation rather than cancellation, rescission, or spe-

ACTIONS BROUGHT BY UNITED STATES FOR BENEFIT OF INDIANS AND

ACTIONS BROUGHT BY INDIVIDUAL INDIANS OR INDIAN TRIBES

February 22, 1973

cific performance of a contract. We believe the term "contract" could be fairly construed to include a lease.

(2) ACTIONS FOR DAMAGES RESULTING FROM TRESPASS OR FIRE ON INDIAN LANDS—SIX YEARS.

This provision does not cover actions to quiet title to Indian lands and there is still no limitation on such actions. Thus, for example, disputes involving boundaries and accreted land would still be viable.

(3) ACTION FOR CONVERSION OF PROPERTY OF THE UNITED STATES—SIX YEARS.

Since actions for conversion lie only with regard to personal property, this provision has no effect on the Indian cases normally handled by the Government.

(4) ACTIONS TO RECOVER DAMAGES FOR TORTS OTHER THAN THOSE LISTED IN (2) AND (3) ABOVE—THREE YEARS.

Since category (2) covers realty cases, few of the tort cases handled by this office would fall within the three-year limitation. We also note that a plaintiff often has a choice between an action in tort or an action based on a contract and that the latter has a six-year statute of limitations.

The scope of the Act is limited to

actions for damages. It therefore has no effect whatever on actions by the United States seeking to enjoin interference with the violation of Indian treaty rights or other rights granted to Indians by federal statutes. Thus actions to protect Indian hunting and fishing rights or to prevent the imposition of State jurisdiction over "Indian country" are unaffected. Water rights are considered to be real property and, therefore, an action to determine the amount of water reserved for a tribe under *Winters* doctrine is similar to a quiet title proceeding and not subject to the provisions of 28 U.S.C. §§ 2415 and 2416. An action for damages for a taking of Indian water would appear to be subject to the Act but we do not believe that the cause of action would accrue until there is a judicial determination of the amount of water vested in the tribe, particularly in light of 28 U.S.C. § 2416(b) excluding from the statute all periods in which facts material to the right of action are not, and reasonably could not be, known to the United States.

The statute has no effect on the right of individual Indians or tribes to sue the United States but in such a suit the United States could assert defenses and counterclaims which would be barred if the United States were asserting the claims as a plaintiff.

If individual Indians or a tribe were to institute litigation, they would be subject to the statute of

limitations applicable to the general public except with respect to actions to quiet title to trust or restricted lands (if the statute were permitted to run in such cases it would conflict with federal statutes prohibiting alienation of Indian lands).

If the United States defends a suit brought against an individual Indian or tribe, the statute permits claims otherwise barred to be asserted as a defense, counterclaim, or offset.

WILLIAM A. GERSHUNY,
Associate Solicitor.

TREATY STATUS OF THE MUCKLESHOOT INDIAN TRIBE OF THE MUCKLESHOOT RESERVATION

Indians: Hunting and Fishing

The Muckleshoot Indian Tribe is an existing federally recognized tribal entity that is a political successor in interest of some of the Indian tribes or bands which were parties to the Treaties of Medicine Creek, 10 Stat. 1132, and Point Elliott, 12 Stat. 927, and therefore the tribe possesses off-reservation fishing rights.

M-36862 *February 22, 1973*

**OFFICE OF THE SOLICITOR
INDIAN AFFAIRS**

July 27, 1972

TO: COMMISSIONER OF INDIAN AFFAIRS.

SUBJECT: TREATY STATUS OF THE MUCKLESHOOT INDIAN TRIBE OF THE MUCKLESHOOT RESERVATION.

By memorandum of July 26, 1972, you requested a legal opinion on the

authority of the Bureau of Indian Affairs to issue treaty fishing identification cards pursuant to 25 CFR 256.3 to members of the Muckleshoot Indian Tribe of the Muckleshoot Reservation in the State of Washington.

The Muckleshoot Indian Tribe is an existing federally recognized tribal entity that is a political successor in interest of some of the Indian tribes or bands which were parties to the Treaty of Point Elliott executed by the United States and a number of tribes and bands on January 22, 1855, ratified by the Senate on March 8, 1859, and proclaimed by the President April 29, 1859, 12 Stat. 927. Article 5 of that treaty secures certain fishing rights to the Indians who were parties thereto.

The Secretary of the Interior issued 25 CFR 256.3, effective August 14, 1967, as part of a regulation whose purposes included:

(1) To assist in protecting the off-reservation non-exclusive fishing rights which are secured to certain Indian tribes by their treaties with the United States:

* * * * *

(6) To assist the states in enforcing their laws and regulations for the management and conservation of fisheries resources in a manner compatible with the treaties of the United States which are applicable to such resources. [25 CFR 256.1(a) (1) and (6)].

This section of the regulation provides that the Commissioner of Indian Affairs shall arrange for the issuance of an appropriate identification card "to any Indian entitled

OF THE MUCKLESHOOT RESERVATION

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thereto" and further provides that such card shall be "prima facie evidence that the authorized holder thereof is entitled to exercise the fishing rights secured by the treaty designated thereon." The Commissioner may cause federal cards to be issued for this purpose or may authorize issuance of cards by proper tribal authorities. To be valid for this purpose, a tribal card must be countersigned by an authorized officer of the Bureau of Indian Affairs certifying that "the person named on the card is a member of the tribe issuing such card and that said tribe is recognized by the Bureau of Indian Affairs as having fishing rights under the treaty specified on such card." The regulations contain further provisions regarding use of the card as a prima facie reliable means of identifying to federal, state or tribal enforcement officers those persons who are entitled to exercise fishing rights secured to Indians by federal treaties.

Ever since such cards were first issued, the Portland Area Director of the Bureau of Indian Affairs has included the Muckleshoot Tribe as one of the tribes whose members are entitled to be issued them, and as of March 17, 1972, 72 cards had been issued to members of that tribe. The earlier of these cards specify the Treaty of Medicine Creek as the treaty by which the fishing rights of the holder were secured. Later cards for this tribe specify the Treaty of Point Elliott.

You advise that agencies of the

State of Washington have questioned the entitlement of the Muckleshoot Tribe and its members to off-reservation fishing rights under any federal treaty, and hence, have questioned whether BIA may lawfully issue or authorize the Muckleshoot Tribe to issue such identification cards to members of that tribe. You, therefore, ask us to advise you as to the status of the Muckleshoot Tribe and as to your authority in this respect.

The Muckleshoot Indian Tribe is a federally recognized tribe of Indians to whom fishing rights are secured under the Treaty of Point Elliott, and also to some extent under the Treaty of Medicine Creek, 10 Stat. 1132. The tribe continues to possess those rights today and may authorize its members to exercise them, subject to such terms and conditions as the tribe may lawfully impose upon its members in accordance with its constitution and by-laws, and subject further to such reasonable and necessary conservation requirements as the State of Washington may lawfully impose in accordance with applicable federal court decisions regarding state authority to regulate exercise of this federally secured right. Accordingly, your authorization for issuance of treaty identification cards to members of this tribe is proper and required by the Secretary's regulation.

The Muckleshoot Indian Tribe of the Muckleshoot Reservation is organized pursuant to the Indian Re-

organization Act of June 18, 1934, § 16, 48 Stat. 984, 987; 25 U.S.C. § 476 (1970). The treaty rights of tribes which reorganize under that Act are expressly preserved by the Act of June 15, 1935, § 4, 49 Stat. 378; 25 U.S.C. § 478b (1970). The term "tribe" is defined by § 19 of the Indian Reorganization Act (48 Stat. 988; 25 U.S.C. § 479 (1970)) as including "the Indians residing on one reservation." Thus, the Indians residing on the Muckleshoot Reservation at the time they voted to reorganize under the Indian Reorganization Act were authorized to establish a reorganized tribal entity, to adopt a name for that entity, and to do so without abrogating or impairing any rights guaranteed under existing treaties with such Indians.

There is no question but that the Indians who were placed upon the Muckleshoot Reservation commencing around 1857 when the reservation was established by the Executive Order of President Pierce of January 20, 1857, were Indians who were parties to the Treaty of Point Elliott and the Treaty of Medicine Creek. The reservation has been continuously maintained for those Indians and their descendants since that time. The historical facts on this matter have been described with considerable thoroughness by an expert anthropologist hired by the United States in connection with recent and pending litigation involving the treaty fishing rights of Muckleshoot Indians, as well as in the annual reports of the Commissioner of Indian Affairs and other

official records of the Department of the Interior, extending over the last 115 years. See *e.g.*, letter of January 19, 1857, from George W. Manypenny, Commissioner of Indian Affairs, to Secretary of the Interior Robert McClelland requesting approval of Governor Stevens' recommendation for establishment of the Muckleshoot Reservation (which derived its name from the prairie on which it was located, not from the Indians who were to be placed thereon). The reservation was to be established pursuant to the President's authority under Article 6 of the Treaty of Medicine Creek (the only western Washington treaty which had been ratified at that time). That Article gave the President authority to remove the Indians from locations established as reservations by Article 2 of that treaty to "such other suitable place or places within [Washington] territory as he may deem fit" and to "consolidate them with other friendly tribes or bands." Identical authority had also been agreed to by the Indians who were parties to the Treaty of Point Elliott (Article 7 thereof), and became effective when that treaty was ratified and proclaimed in 1859.

Pursuant to authority of those two treaties Indians from the Green and White Rivers areas, who constituted bands that were parties to the Treaty of Point Elliott, as well as some up-river Puyallup Indians who were party to the Medicine Creek Treaty, were removed to and consolidated on the Muckleshoot Reservation.

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Later, but still early, examples of official recognition of the foregoing facts and the treaty status of the Indians of the Muckleshoot Reservation (whom the Government subsequently referred to as "Muckleshoot Indians" from the name of the reservation on which they had been located) are found in the "Report of the Commissioner of Indian Affairs to the Secretary of the Interior" of 1860 ("White River has a large tributary, called Green River, and between these two streams, seven miles from the fork is the Mucklechute Reservation. This reservation is secured to the Indians, parties to the treaty of Medicine Creek, but is not in the territory ceded by them, has never been occupied for their use * * *. On the other hand, it is in the limits of the territory ceded by the treaty of Point Elliott. The Indians living there, and in the vicinity, are parties to that treaty * * *" at 193), 1867 ("The Point Elliott Treaty * * * consists of the Tu-la-lip, Surin-mish, Lummi, Post [sic] Madison, and Muckleshoot Reservations," at 30), 1870 (at page 17), 1871 ("The reservations under this treaty [of Point Elliott] are Tulalip, Port Madison, Lummi, Surnomish, and Muckleshoot * * *" at 272) and 1872 ("The D'Wamish and other allied tribes number 3600 and have five reservations, containing in all 41,716 acres, set apart by treaty made with them in 1855 * * *." at 60.)

The extensive, thorough research of Dr. Barbara Lane, the anthropologist referred to above, conforms

the consistent position of this Department that the vast majority of the Indians placed on the Muckleshoot Reservation were White and Green River Indians who were identified in the preamble to the Treaty of Point Elliott as the Skopamish, Stkamish, and Smulkamish Bands of the Duwamish Indians. The remaining Indians placed upon the Muckleshoot Reservation were from tribes or bands that were parties to the Medicine Creek Treaty.

Since the fishing rights provisions of the two treaties are essentially identical, it is our view that the consolidated groups of Indians placed upon the Muckleshoot Reservation and now reorganized under the name of "The Muckleshoot Indian Tribe of the Muckleshoot Reservation" pursuant to 25 U.S.C. § 476 (1970), presently retain a treaty-secured right to fish at the usual and accustomed places of the villages and bands that were removed to that reservation.

The Secretary of the Interior and his delegates are charged in broad terms with the functions, duties and obligations to execute the Federal guardianship of the Indians and the management of Indian Affairs. 25 U.S.C. § 2 (1970); 43 U.S.C. § 1457 (1970); Reorganization Plan 3 of 1950, 64 Stat. 1262, 43 U.S.C. § 1451 (1970), note following. The regulation providing for the issuance of treaty fishing identification cards was issued pursuant to the authority of 25 U.S.C. § 2 (1970). Exercise of

all appropriate powers to execute what has been called the Federal guardianship of the Indians has been many times sustained without any additional specific statute authorizing the particular action. In *Armstrong v. United States*, 306 F. 2d 520 (10th Cir. 1962), the court said (p. 522):

The United States, by virtue of its status as guardian, is responsible for the protection of the Indians on a reservation so long as they are wards of the government. *United States v. Sandoval*, 231 U.S. 28, 46, 34 S. Ct. 1, 58 L.Ed. 107; *Choctaw Nation v. United States*, 119 U.S. 1, 27, 7 S. Ct. 75, 30 L.Ed. 306; *United States v. Kagama*, 118 U.S. 375, 6 S. Ct. 1109, 30 L. Ed. 228, Congress has provided: "The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations." Rev. Stat. § 463 (1875), 25 U.S.C.A. § 2. This statute furnishes broad authority for the supervision and management of Indian affairs and property commensurate with the obligation of the United States. *United States v. Birdsall*, 233 U.S. 223, 34 S. Ct. 512, 58 L.Ed. 930; *United States v. Ahtanum Irrigation Dist.*, 9 Cir., 236 F.2d 321, cert. denied, 352 U.S. 988, 77 S. Ct. 386, 1 L.Ed.2d 367; *United States v. Anglin & Stevenson*, 10 Cir., 145 F.2d 622, 628, cert. denied, 324 U.S. 844, 65 S. Ct. 678, 89 L.Ed. 1405; *Rainbow v. Young*, 8 Cir. 161 F. 835. See *United States ex rel. West v. Hitchcock*, 205 U.S. 80, 84, 27 S. Ct. 423, 51 L.Ed. 718 * * *.

Justice Van Devanter, then Circuit Judge, in *Rainbow v. Young*, 161 F. 835 (8th Cir. 1908), when sustaining the authority of the Secretary of the Interior to exclude collectors from a reservation on the

day payments were to be made to the Indians, referred to R.S. 441 and 463 to R.S. 2058, defining the general duties of the Indian agents and to R.S. 2149 as to removal of persons from Indian reservations, and said (p. 838):

No other statute imposes any limitation applicable here upon the exercise of the authority so given to the Commissioner, and upon this record it cannot reasonably be doubted that the [C]ommissioner, in giving to the superintendent the direction before named, acted with the approval of the Secretary of the Interior. * * * [Citations omitted]

In our opinion the very general language of the statutes makes it quite plain that the authority conferred upon the Commissioner of Indian Affairs was intended to be sufficiently comprehensive to enable him, agreeably to the laws of Congress and to the supervision of the President and the Secretary of the Interior, to manage all Indian affairs, and all matters arising out of the Indian relations, with a just regard, not merely to the rights and welfare of the public, but also to the rights and welfare of the Indians, and to the duty of care and protection owing to them by reason of their state of dependency and tutelage.

Illustrative of the same approach is *United States v. Birdsall*, 233 U.S. 223 (1914), holding that, despite the absence of written rule or regulations authorizing the Commissioner to make recommendations concerning sentences for convictions of violation of the laws covering liquor traffic with the Indians, bribery to influence action in the making of such recommendations was a violation of the statute punishing bribery to influence official action. And in *Parker, Supt. Five*

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Civilized Tribes v. Richard et al., Admrs., 250 U.S. 235 (1919), as to supervision of lease income of restricted Indian lands, Justice Van Devanter briefly remarked (p. 240):

* * * In the absence of some provision to the contrary the supervision naturally falls to the Secretary of the Interior. Rev. Stat. §§ 441, 463.

See also *United States ex rel West v. Hitchcock*, 205 U.S. 80, 85 (1907); *cf. Catholic Bishop of Nesqually v. Gibbon*, 158 U.S. 155, 166 (1895); *United States v. Barnsdall Oil Co.*, 127 F.2d 1019, 1021 (C.A. 10, 1942).

In *Rainbow*, *supra*, Justice Van Devanter had quoted from *United States v. Macdaniel*, 10 U.S. (7 Pet. 1) 376, 380 (1833), that (pp. 14-15):

A practical knowledge of the action of any one of the great departments of the government, must convince every person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow that he must show a statutory provision for every thing he does. No government could be administered on such principles. To attempt to regulate by law the minute movements of every part of the complicated machinery of government, would evince a

most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers there are numberless things which must be done, that can neither be anticipated nor defined, and which are essential to the proper action of the government. * * *

In *Federal Indian Law* (1958 Ed.), these basic principles are summarized as follows: (p. 49) "Federal administrative power over Indian affairs, vested in the Secretary of the Interior, is virtually all-inclusive." (pp. 51-52) "* * * Discretionary power to act in situations not specifically provided for, often is lodged in the Secretary."

In conclusion, we advise you that the issuance of 25 CFR 256.3 was an authorized exercise of the Secretary's duties and obligations of Federal guardianship of Indians and management of Indian affairs, and that the authorization for issuance of treaty fishing identification cards to members of the Muckleshoot Indian Tribe is obligatory under such regulations because that tribe has fishing rights secured by the Treaties of Point Elliott and Medicine Creek.

WILLIAM A. GERSHUNY,
Associate Solicitor.

March 19, 1973

**AFFINITY MINING COMPANY
KEYSTONE NO. 5 MINE**

2 IBMA 57

Decided March 19, 1973

Appeal from a decision of Chief Administrative Law Judge Hom, dated October 4, 1972, dismissing a civil penalty assessment proceeding (Docket No. HOPE 72-200-P) initiated against Affinity Mining Company by the Bureau of Mines pursuant to section 109(a)(1) of the Federal Coal Mine Health and Safety Act of 1969.

Affirmed as modified.

Federal Coal Mine Health and Safety Act of 1969: Penalties: Penalty Against Operator

More than one person may fall within the Act's definition of "operator," but the proper party to be held liable for penalties is the operator responsible for the violations and liable for the health and safety of its employees even though such operator is an independent contractor.

Federal Coal Mine Health and Safety Act of 1969: Penalties: Penalty Against Operator

The Bureau of Mines has the initial discretion in serving orders and notices; however, since the question of the responsible operator is a factual determination, the Bureau's discretion must be subject to and withstand the scrutiny of administrative review.

APPEARANCES: Robert W. Long, Associate Solicitor, J. Philip Smith, Assistant Solicitor, Madison McCulloch, Trial Attorney, in behalf of the appellant, U.S. Bureau of Mines; Thomas E. Boettger, Esquire, in behalf of appellee, Affinity Mining Company; Lynn D. Poole, Esquire, in

behalf of amicus curiae, Bituminous Coal Operators' Association.

**OPINION BY THE BOARD
INTERIOR BOARD OF MINE
OPERATIONS APPEALS**

On February 3, 1972, a civil penalty proceeding was initiated by the Bureau of Mines (hereinafter Bureau) pursuant to the provisions of section 109 of the Federal Coal Mine Health and Safety Act of 1969 (hereinafter the Act).¹ The procedural and factual background is adequately set forth in the decision of the Administrative Law Judge at 2 IBMA 63.² An appeal to that decision was filed by the Bureau on October 24, 1972. On November 9, 1972, Bituminous Coal Operators' Association (hereinafter BCOA) petitioned for leave to participate as amicus curiae which was granted by Order of the Board dated November 15, 1972. Timely briefs were filed by all of the parties, including Affinity Mining Company (hereinafter Affinity), and upon the Board's own motion oral argument was ordered on January 9, 1973, and held January 26, 1973.

Contentions of the Parties

The Bureau contends (1) that Affinity is the proper party to the proceedings as the one and only operator of the coal mine; and (2) in

¹ P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

² The Judge's decision follows at 2 IBMA 63, 80 I.D. 231.

the alternative, that if both Affinity and Cowin are "operators" of the mine, then the Bureau should have the sole discretion to choose whether to proceed against one or the other, or both, in a civil penalty proceeding; and (3) an independent contractor performing work in a coal mine is not an operator but an "agent"³ of the operator for purposes of civil penalty liability under the Act.

Affinity contends that a coal company, although it may be an operator, should not be held responsible in a civil penalty proceeding under the Act for the violations of an independent contractor who is also an operator.

BCOA argues that an independent contractor should be held solely responsible for its own violations of the Act committed in areas of a coal mine under its control and that there is no basis or legal justification for application of a primary-secondary liability⁴ for civil penalties as alluded to by the Chief Judge.

Discussion

This Board agrees with the result reached by the Chief Judge dismissing the proceeding against Affinity, and the decision will be affirmed to that extent. However, in the course of his opinion, the Judge, by way of dicta, suggested that Affinity might have some secondary liability to pay penalties. Although the

Judge found it unnecessary to resolve this issue, the Board is compelled to disagree with this thesis. A doctrine of primary-secondary liability the Board feels is erroneous and unjustified, and the following discussion is directed to that area of disagreement with the Judge's decision.

We cannot accept the Bureau's contention that for each coal mine there can be but one "operator" and that the common law status of "independent contractor" has been abrogated by the Act. The Bureau contends that an independent contractor falls under the definition of "agent" and thus by inference cannot also be an "operator." We cannot agree. The legislative history of the Act describes mine foremen and superintendents as agents of the operator,⁵ thus supporting the common law theories of agency adopted in section 3(e) of the Act.

To give true meaning to the expressions of the Congress we consider that the term "operator" must be read together with responsibility for health and safety of employees (miners, workers). Therefore, while more than one person may fall technically within the definition of "operator," only the one responsible for the violation and the safety of employees can be the person served with notices and orders and against whom civil penalties may be assessed.

³ Section 3(e) "agent" means any person charged with the responsibility for the operation of all or part of a coal mine or the supervision of the miners in a coal mine.

⁴ See Judge's decision, *supra*, at 67 and 80 I.D. 234, 235.

⁵ Committee on Education and Labor, House of Representatives, 91st Cong., 2d Sess., Legislative History Federal Coal Mine Health and Safety Act (March 1970) at 44.

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We cannot agree that there can be a more or less offending party. Inherent in the Act and its definitions is the concept of liability of an operator for violations of safety standards. While we concede that in this case both Affinity and Cowin technically fall within the definition of "operator," the proper party to be held liable for penalties is that operator responsible for the violations and liable for the health and safety of its employees. Under the facts of this proceeding, Cowin as an "independent contractor" was responsible for the operation and was responsible for the safety of its workers.

We do not intend by this decision to imply that an operator such as Affinity would be immune from liability for assessment of penalty where it materially abetted violations of its independent contractor (Cowin), or actually committed such violations through a principal-agent relationship. This is a factual determination to be made on a case-by-case basis, but, in any event, not present in the instant proceeding.

In light of the foregoing holding, we must also reject the Bureau's alternative argument that it has unlimited discretion to choose between operators in penalty assessment proceedings. Certainly the Bureau has the initial discretion in serving orders and notices. However, since the question of the responsible operator is a factual determination, this discretion is not unlimited and must be subject to and withstand the scrutiny of administrative re-

view. The choice of a proper party is an inherent responsibility of enforcement which cannot be renounced by administrative fiat.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board of Mine Operations Appeals by the Secretary of the Interior (43 CFR 4.1(4)), **IT IS HEREBY ORDERED** that the Chief Judge's decision of October 4, 1972, granting the Motion to Dismiss the proceeding **IS AFFIRMED**.

C. E. ROGERS, JR.,
Chairman.

DAVID DOANE,
Member.

JAMES M. DAY,
Ex-Officio Member.

2 IBMA 63

October 4, 1972

DECISION

Statement of Case.

On February 4, 1972, the Bureau of Mines filed a petition for the assessment of civil penalties against respondent, Affinity Mining Company, for alleged violations of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 *et seq.* (1970).

The petition was filed pursuant to section 109 of the Act, 30 U.S.C. § 819 (1970), which provides in part as follows:

Sec. 109.(a) (1) The operator of a coal mine in which a violation occurs of a

mandatory health or safety standard or who violates any other provision of this Act * * * shall be assessed a civil penalty by the Secretary [of the Interior] * * * which penalty shall not be more than \$10,000 for each such violation. * * * In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

The petition alleged violations of 30 CFR 75.200 and 75.1400 as set forth in order of withdrawal No. 1, issued on December 21, 1970. The order named "Affinity Coal Company" as the operator of the mine.¹

Respondent filed an answer asserting, *inter alia*, that the order concerned practices of the Cowin Construction Company at the time and that respondent had no employees of its own at the mine. In its prehearing statement respondent elaborated its position, asserting that Cowin was an independent contractor performing work for respondent and that it was not an agent of respondent; therefore respondent was not liable for the violations charged.

A hearing was held at Charleston, West Virginia, on May 9, 1972, at which the Bureau and respondent were represented by counsel. The Bureau called as a witness Federal

coal mine inspector Thomas Allamon, who issued the withdrawal order. Respondent called as its sole witness John W. Cook, mine accountant for respondent.

At the conclusion of the Bureau's case, respondent moved that the petition be dismissed on the ground that Cowin was not an agent of respondent or subject to its direction, supervision and control and that the petition should have been directed to Cowin. The motion was taken under advisement. (Tr. 54-55.)

Issue.

The basic issue presented here is whether respondent should be subject to the assessment of civil penalties for the violations charged here, assuming that the violations occurred.

Factual Circumstances.

Before considering the legal questions involved, it is necessary to consider the factual circumstances present. The pertinent facts are not disputed and I find them to be as follows:

The Keystone No. 5 mine is located on land leased by Affinity from Pocahontas Land Corporation. The mine was originally opened by the Lillybrook Coal Company. It was shut down in 1958 and sealed in 1970. At that time a 1200-foot slope had been driven from the surface to the No. 4 seam and that seam had been mined.

In 1970, Affinity obtained State permits to reopen the mine for the purpose of developing a new coal seam, the No. 3, lying under the

¹ The name "Affinity Coal Company" was used in error; the proper name was "Affinity Mining Company."

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No. 4 seam. Affinity contracted with Cowin & Company, Inc., on October 13, 1970, to extend the slope from the No. 4 seam into the No. 3 seam. On December 21, 1970, when the withdrawal order was issued, the slope had been driven a distance of 35-40 feet. The ultimate length of the slope was to be 600 feet. Eighteen men were employed to drive the slope, six men working on each of three shifts per day.

All 18 men were employed by Cowin. Their work was directed by Edward Stamper, superintendent for Cowin. Affinity had no employees working underground at the time or on the slope project. Affinity did employ William Mabe as overseer engineer for the entire project of reactivating the mine. His duties were to oversee the planning of the mine, the construction of the cleaning plant and outside facilities, and the installation of adequate ventilation facilities for the slope project. The No. 4 seam was utilized for ventilation. Specifically, with respect to the slope project Mr. Mabe's function was to approve necessary design changes and the completed project. He had no direction of the work force employed by Cowin. Such direction and supervision were exercised solely by Mr. Stamper. The two men did have side-by-side trailer offices at the site.

In December 1970, the slope to the No. 3 seam was being driven at an 18 degree pitch. Air hammers were being used to drill holes in the solid rock. An open type steel mine car with a hoisting rope was used to

transport the rock removed to the surface. The car was also used to transport the men.

On December 21, 1970, when Inspector Allamon visited the mine, he found loose brows, or areas of loose materials, in the roof of the slope. The roof was being bolted only in accordance with directions from the foreman to the men; there was no approved roof control plan. The hoist had no overwind control, the hoisting equipment was not examined daily, and the mine car had no safety catches or runaway protective devices. For these and other reasons Inspector Allamon issued an order of withdrawal pursuant to section 104(a) of the Act, 30 U.S.C. § 814(a) (1970).

All the conditions described in the order pertained to the new slope being driven to the No. 3 seam. The withdrawal order did not concern the old slope from the surface to the No. 4 seam. Consequently, any subsequent reference in this decision to the "slope" means the new slope.

As stated earlier, the order named Affinity as the operator but the order was served on Mr. Stamper. The order was modified on December 24, 1970, and later dates and was finally terminated on February 25, 1971.

Applicable Law.

Section 109(a) (1) of the Act provides that the "operator" of the mine in which a violation occurs shall be assessed a civil penalty. "Operator" is defined in section 3

of the Act, 30 U.S.C. § 802 (1970), as follows:

(d) "operator" means any owner, lessee, or other person who operates, controls, or supervises a coal mine;

Section 2 defines "coal mine" as follows:

(h) "coal mine" means an area of land and all structures, * * * shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal * * *.

The definition of "operator" is essentially the same as the definition of that term in the legislation as it was introduced in the Senate and passed by that body.²

Commenting on that definition the Senate Committee said:

The definition of an "operator" is designed to be as broad as possible to include any individual, organization, or agency, whether owner, lessee or otherwise, that operates, controls, or supervises a coal mine, either directly or indirectly. S. Rep. No. 91-411, 91st Cong., 1st sess. 45 (1969).

Viewing the general language of the definition in this broad sense, it could be argued literally that Affinity supervised the Keystone No. 5 mine, which would include the new slope being driven in it, and therefore that it was an operator of the mine. While Affinity did not direct or control the day by day work of the men driving the slope, it approved design changes and saw to it

that work was completed according to plan. This is arguably supervision in a broad but not unreasonable sense.

As to whether an operator, in this liberal sense, is subject to civil penalties for violations committed by those not under its direct control, it is to be noted that section 109(a)(1) does not limit the imposition of civil penalties to an operator whose agents or employees commit the violations. Section 109(a)(1) states that liability is fastened on "[t]he operator of a coal mine in which a violation occurs." No causal connection is specified as a requirement for imposing a penalty. In fact, the legislative history of section 109 suggests a Congressional intent to impose absolute liability. The conference report on section 109 stated:

2. The Senate bill provided that, in determining the amount of the civil penalty only, the Secretary should consider, among other things, whether the operator was at fault. The House amendment did not contain this provision. *Since the conference agreement provides liability for violation of the standards against the operator without regard to fault*, the conference substitute also provides that the Secretary shall apply the more appropriate negligence test, in determining the amount of the penalty, recognizing that the operator has a high degree of care to insure the health and safety of persons in the mine. H. Rep. No. 91-761, 91st Cong., 1st sess. 71 (1969); (Italics added).

This broad extension of liability suggests that the traditional relationships of principal-agent, employer-employee, and contractor-independent contractor are not to determine who is to be liable or not

²The only difference is that the Act uses the phrase "who controls" whereas the bill before the Senate said "who * * * has control of."

liable for violations of safety standards occurring in a coal mine.

Even though these considerations point to the conclusion that Affinity may properly be held to be an operator of the Keystone No. 5 mine, which necessarily includes the new slope in which violations are assumed to have occurred, and is therefore liable for those violations, I do not find it necessary to reach that conclusion. The reason is that whatever doubt may exist as to whether Affinity was on December 21, 1970, the operator of the mine so far as the new slope was concerned, there is no question but that Cowin was. I find that Cowin, as an independent contractor, is in no different posture from the Centennial Development Company, an independent contractor engaged in sinking a shaft for Island Creek Coal Company, which was found to be an operator subject to the Act by Administrative Law Judge William Fauver in *Centennial Development Company*, NORT 71-95 (November 26, 1971). Cowin was clearly a "person who operates, controls, or supervises a coal mine" to the extent that the new slope was concerned. It was performing the work in that slope with its own employees. It had the obligation to see to it that the roof was safe and that the hoisting equipment, which it was operating, was safe. In short, it was responsible for the conditions that existed and for such remedial actions as were necessary to prevent violations of safety standards from occurring and to correct violations that did occur.

Because Cowin was directly and primarily, if not exclusively, responsible for the violations that assertedly occurred, I believe that it should have been the target for an assessment of civil penalties instead of Affinity. Assuming that either could be held liable as an operator of the mine, I do not think that sanctions should be sought against the less offending party. For that reason I conclude that the proceedings against Affinity should be dismissed.

Accordingly, the motion of respondent to dismiss the proceeding is granted and the proceeding is ordered dismissed.

ERNEST F. HOM,

Chief Administrative Law Judge.

APPEAL OF JOHN H. MOON & SONS

IBCA-815-12-69

Decided March 23, 1973

Appeal from Contract No. NPS-WASO-NATR-V-63/17, Natchez Trace Parkway Project 3T3: National Park Service.

Motion for Reconsideration Denied.

**Contracts: Disputes and Remedies
Damages: Liquidated Damages—Contracts: Performance or Default: Excusable Delays—Rules of Practice: Appeals: Burden of Proof—Rules of Practice: Evidence**

The Board denies a Government motion for reconsideration where it finds that a diary entry contained in an exhibit offered in evidence by the Government, to-

gether with the testimony of a witness for the appellant created an inference that the Government was responsible for an indeterminate portion of a protracted delay in removing utility poles from the work area on a road construction job and that the Government failed to rebut such inference even though information having a direct bearing on the propriety of liquidated damages assessed for delayed performance was apparently within its possession or was more accessible to it than it was to the appellant. The Board therefore reaffirmed its prior holdings that no attempt should be made to apportion the delay between the parties and that the contract time should be extended to the date the contract was determined to be substantially complete.

APPEARANCES: For appellant, Mr. Robert B. Ansley, Jr., Attorney at Law, Smith, Currie & Hancock, Atlanta, Georgia; for the Government, Mr. Justin P. Patterson, Department Counsel, Washington, D.C.

OPINION BY MR. McGRAW
INTERIOR BOARD OF
CONTRACT APPEALS

The Government has filed a timely motion for reconsideration of the portion of our decision dated July 31, 1972,¹ relating to Claim A in which the Board in effect found that the Government was responsible for an indeterminate portion of the delay resulting from the failure to timely remove utility poles from

the contract work area. The Board therefore extended² the time for contract performance by the 63 days for which liquidated damages had been assessed.

The motion states that the Government would be agreeable to reopening the hearing on this matter if the Board is not persuaded by the arguments advanced. As our analysis *infra* indicates, we have not been persuaded that the Board's decision is in error; nor do we see any reason why the Government should be permitted to reopen the hearing for the purpose presumably of attempting to show that the facts related to the delay in the removal of the poles are somewhat different from what the Board concluded them to be based upon the record made in the earlier proceedings. The motion does not even allege that the evidence the Government would offer in a new hearing was not available³ to it prior to the hearing in October of 1970. The motion clearly indicates that the Government is not concerned over the fact that a 63-day time extension was granted to

¹ *John H. Moon & Sons*, IBCA-815-12-69 (July 31, 1972), 79 I.D. 465, 72-2 BCA par. 9601. By letter dated August 11, 1972, the appellant requested a 60-day extension of time to submit a motion for reconsideration involving other aspects of the decision adverse to the appellant. Even though the request was granted and the time was further extended, no motion for reconsideration has been filed by the appellant.

² In granting the time extension the Board acted under the authority contained in Clause 5, Termination for Default-Damages for Delay—Time Extensions of the General Provisions of Standard Form 23-A (April 1961 Edition). See *Young Associates, Inc. v. United States*, 18 CCF par. 81, 980 (Ct. Cl. 1973), *aff'g Young Associates, Inc.*, IBCA-557-4-66, 67-2 BCA par. 6676 (November 3, 1967); 69-1 BCA par. 7419 (December 4, 1968).

³ Absent a showing that the new evidence to be offered was not readily available prior to the time the principal decision was rendered, motions for reconsideration are properly denied. See, for example, *South Portland Engineering Company*, IBCA-771-4-69 (January 29, 1970), 70-1 BCA par. 8092.

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the appellant⁴ but is disturbed by the harsh result which it foresees may come to pass if the basis for the decision remains unchanged. For the reasons set forth in some detail below, we consider the harsh results which allegedly could ensue from the Board's decision to be largely of a chimerical nature. In any event, mere disagreement with the result is not a proper basis for reconsideration of the decision.

The Government's motion for reconsideration is predicated upon the following seven principal grounds:

1. *The appellant failed to prove by a preponderance of the evidence that the Government interfered with or lacked diligence with respect to the removal of the poles under standards established in such cases as Davis v. United States*, 180 Ct. Cl. 20 (1967) and *Ben C. Gerwick, Inc. v. United States*, 152 Ct. Cl. 69, at 77 (1961).⁵

⁴ Government Motion, p. 12.

⁵ Asserting that the appellant has the burden of proving the amount of equitable adjustment in both money and time, the Government cites *Bergen Construction, Inc.*, GSBCEA No. 1058 (November 20, 1964), 65-1 BCA par. 4554; *Coastal Contracting and Engineering Co., Inc.*, ASBCA No. 4835 (July 28, 1958), 58-2 BCA par. 1875; and *McBride & Wachtel, Government Contracts*, Sec. 28.250 (Equitable Adjustment). We are fully in accord with the general principles recognized in the cited authorities. In this case, however, the claims asserted under the Changes Clause were dismissed for lack of jurisdiction (notes 69, 76 and 77, principal opinion), and the relief provided by the Board was under the authority contained in Clause 5 (note 2, *supra*). We note that the findings from which the instant appeal was taken lists Clause 5 (but not Clause 3, Changes) among the General Provisions regarded as "particularly significant in the consideration and evaluation of the contractor's claims."

In the absence of unusual circumstances this Board has consistently adhered to the generally accepted rule that the appellant has the burden of proving the claims asserted by a preponderance of the evidence irrespective of whether the appellant seeks additional money⁶ or additional time.⁷ The preponderance of the evidence rule has not been mechanically applied by either the Court of Claims⁸ or the boards,⁹ however, in cases where the Government is asserting a claim for

(Findings, note 4 of principal opinion, pp. 4, 5.)

⁶ *R. E. Hall Construction Company, et al.*, IBCA-465-11-64 (September 26, 1967), 67-2 BCA par. 6597.

⁷ *R & R Construction Company*, IBCA-413 and IBCA 458-9-64 (September 27, 1965), 72 I.D. 385, 393-94, 65-2 BCA par. 5109, at 24,064.

⁸ See, for example, *Austin Engineering Co., Inc. v. United States*, 97 Ct. Cl. 68, 79 (1942); *Wharton Green & Co., Inc. v. United States*, 86 Ct. Cl. 100, 108 (1937); and *Sun Shipbuilding & Dry Dock Co. v. United States*, 76 Ct. Cl. 154, 188 (1932) ("The rule is well settled that where both parties are responsible for the delay in completion of the contract and it is impossible to ascertain the true balance by setting off one against the other, no liquidated damages can be assessed * * *").

⁹ See *Minimar Builders, Inc.*, GSBCEA No. 3430 (July 28, 1972), 72-2 BCA par. 9599; *Lea County Construction Company*, ASBCA No. 13964 (February 3, 1972), 72-1 BCA par. 9298; *Framlau Corporation*, ASBCA No. 14479 (September 21, 1971), 71-2 BCA par. 9082; and *Hardeman-Monier-Hutcherson*, ASBCA No. 11869 (August 7, 1967), 67-2 BCA par. 6522, at 30,312 ("It is obvious that the delays to the job did not result from any one of these causes, but followed from a combination of them all. We cannot apportion the delays among the various causes thereof. The practical effect in this case of whether or not the time extension should be granted is limited to whether the respondent may collect liquidated damages. * * * The basic principle applicable has long been established. Where the owner prevents performance by the construction contractor, he cannot collect liquidated damages for the delay. * * *").

liquidated damages for delayed performance; the evidence indicates that the Government has been responsible for some portion of the delay; and the state of the record is such that the extent to which the Government and the contractor have contributed to the concurrent or intertwined delay cannot be determined with reasonable accuracy.

We noted in our principal opinion the absence of any evidence in the record indicating that at the time of the preconstruction conference on July 11, 1963, either party contemplated that utility poles would present a problem on Project 3T3 (notes 16 and 21).¹⁰ According to appellant's witness Rushing, poles became a problem when the Government had to obtain more right-of-way in order to build the detour road in accordance with the plans. Mr. Caldwell testified, however, that the removal of the poles became necessary when the Government changed its plans as to the point at which the detour would enter present U.S. Highway 61. In the course of his testimony Government witness Jordan acknowledged that there had been a change in the alignment of the road; that the right-of-way was tight; and that if the slope ratio had not been changed, the Government would have been in near proximity to or past its existing right-of-way (note 25). In any event, it is clear that following the award of the contract some action

or actions taken by the Government contributed to the problems that subsequently arose with respect to the poles and that at the time of bidding the work covered by Project 3T3 neither the contractor nor his grading subcontractor had any reason to take into account the extent to which performance would be affected by having utility poles within the prism of work.

While the record does not permit us to find the date upon which the removal of utility poles became a factor to consider in proceeding with the work on the project, the poles were recognized as constituting a sufficient problem to warrant conferences among the parties principally concerned in late December of 1963, and again on April 15, 1964 (note 49 and accompanying text). Although the April conference occurred at approximately the midpoint of the 71-day period in which, according to the appellant, the delays started affecting its cost of operation from minimal to an increasing intensity, the poles were not removed for over a month thereafter (notes 8 and 53). The key to why it took so long to accomplish so comparatively simple a task (note 53) is not revealed by the record. Except for the cryptic statement in Rushing's diary for April 17, 1964, "Mr. Chambers—NPS-told me today that the tel. co. would not move their line on detour at Hwy. 61 until paper work was approved" (note 51), the only explanation offered for the protracted delay is Rushing's testimony—over six years after the

¹⁰ Except as otherwise indicated, all references to footnotes in the text are to those appearing in the principal opinion (note 1, *supra*).

event—that he recalled the telephone company was insisting upon being paid in advance for moving the poles (note 71). Whatever the reasons, it does not appear that the resident engineer had much more information¹¹ as to the underlying cause or causes of the continuing delay in removing the utility poles from the work site than did the grading subcontractor's superintendent.

According to Rushing's testimony the months of delay in removing the utility poles impeded contract performance.¹² Government witness Jordan estimated that somewhere between 2,000 and 20,000 cubic yards of excavation may have been involved in the areas affected by the poles.¹³ He expressed doubt that prosecution of the work had been significantly affected by the delay in removing the poles from the work area, however, and testified to the manner in which the actions of the grading subcontractor's superintendent had contributed to the delays

of the project work.¹⁴ It appears to be undisputed that the Government had greater knowledge of the reason for the delay in the removal of the poles than did the appellant (note 71).

With respect to the first and principal contention advanced by the Government, we note the leading case of *Paul C. Helmick Company*, IBCA-39 (July 31, 1956), 63 I.D. 209, 230-31, 56-2 BCA par. 1027 at 2206 in which the Board stated:

It may be assumed that the ultimate burden of proving that the Government did not make every reasonable effort to make the adjacent danger trees available is on the contractor. In view of the nature and duration of the delay, however, the burden must be regarded as shifting to the Government to offer some reasonable explanation of the delay. The record is, however, devoid of any such explanation. * * * As the Government has failed to offer any explanation of the long and protracted delay, the Board is constrained to conclude that it did not make every reasonable effort to secure the danger tree areas adjacent to the special tracts in advance of the contractor's clearing operations. (Citations omitted).¹⁵

While the factual situations involved in *Helmick* and in the instant case are quite different, there are some important similarities.¹⁶ In both there was a long and pro-

¹¹ The fact that the poles were not removed for two weeks after the date Mr. Herrin said he had been told the telephone lines would be moved (Government Exhibit "O", 5-1-64) casts grave doubt upon the completeness and the accuracy of the information generally available at the project level with respect to the poles.

¹² Notes 9 and 56 of principal opinion and accompanying text. While Rushing acknowledged that some work could and did proceed at other locations during the period for which delay claims for both time and money had been asserted, he testified that the work went forward under more adverse conditions than would otherwise have been the case (note 9, principal opinion).

¹³ Tr. 459; note 60 and accompanying text in principal opinion.

¹⁴ Tr. 973-74; notes 58-61 of principal opinion and accompanying text.

¹⁵ Affirmed on reconsideration, 63 I.D. 383, 56-2 BCA par. 1096 (October 31, 1956). See also *Cen-Vi-Ro of Texas, Inc.*, IBCA-718-5-68 and IBCA-755-12-68 (February 7, 1973), 80 I.D. 29 at footnote 96 and accompanying text.

¹⁶ See portion of *Helmick* opinion quoted in text and discussion in *Moon* decision, note 1, *supra*, 79 I.D. 499-500, 72-2 BCA par. 9601, at 44,877.

tracted delay which allegedly affected the contractor's operations adversely and concerning which the Government offered no explanation, even though it apparently had access to more detailed information than did the appellant. In *Helmick* the Board found the circumstances were such that the contractor should be awarded additional compensation. In the instant case we found the Government was responsible for an indeterminate portion of the unexplained delay and therefore concluded that no liquidated damages should be assessed for the delayed performance.

2. *The statement by Government counsel in his brief indicating that a question existed as to whether the Government or the telephone company was responsible for the delay in approval of the necessary paper-work for removal of the poles should not have been relied upon by the Board since the statement was not evidentiary and was made arguendo.*

We readily acknowledge that the statement made by Government counsel (note 71) was not evidentiary and was made *arguendo*. The statement is considered to be a fairer appraisal of the evidence of record, however, than the suggestions now made that possibly the telephone company would not remove their lines until the power company had approved the paper work or possibly the Mississippi Highway Department, a conduit between the Government and the

utilities, could have delayed the paper work.¹⁷ We note that these belated suggestions are not accompanied by any citation to the transcript or to the exhibits in evidence. They have no probative effect.

3. *The appellant has not proved by a preponderance of the evidence that the utility company was held up in any way by the Government's failure to make payment and there is no support for such a finding in the Board's decision.*

Contrary to Government counsel's assertion, the Board made no finding to the effect that the utility company was held up by the Government's failure to make payment. As the opinion clearly indicates at footnote 137 and the accompanying text, the Board attached little weight to Rushing's testimony indicating that the telephone company's insistence upon payment prior to removing the poles may have been the source of the difficulty. The inference drawn by the Board adverse to the Government was based upon the entry recorded in Rushing's diary on April 17, 1964 (note 51), which was proffered in evidence by the Government as its Exhibit "O" (Tr. 794), together with Rushing's testimony that the grading subcontractor looked to the Government for relief (Tr. 852) and the Government's failure to offer any explanation in this context for the protracted delay in removing the poles from the area to be graded, even though it appears to be undisputed

¹⁷ Government Motion, pp. 5, 6.

that the Government had greater knowledge of the reason for the delay than did the appellant (note 71).

4. *The Board's reliance upon Tobe Deutschmann Laboratories, NASA BCA No. 73 (February 25, 1966), 66-1 BCA par. 5413, is misplaced because the decision in that case was based upon a finding that by a preponderance of the evidence the Government had been shown to have been partially at fault for the delay involved.*

Tobe Deutschmann and Wharton-Green were cited in note 157 of the principal opinion for the proposition that there can be no recovery against the contractor where the delay caused by the Government is inseparable from that caused by the appellant. Prior to the reference to these cases, the Board had outlined the circumstances which had caused it to conclude by way of an inference that the Government was responsible for a portion of the delay in securing the timely removal of the utility poles.¹⁸

5. *The Government was entitled to assume that since no evidence was submitted proving Government fault, no issue was presented at the hearing which it was required to refute.*

Government counsel appears to have overlooked the allegations con-

tained in appellant's complaint,¹⁹ the assessment offered by appellant's counsel in his opening statement,²⁰ the testimony offered by appellant's witness Rushing that he looked to the Government to remedy the situation,²¹ in conjunction with the entry in his diary on April 17, 1964,²² and the absence of testimony from Government witnesses to explain the protracted delay in removing the poles which Rushing testified adversely affected the grading subcontractor's operations,²³ concerning which the Government had access to greater information than did the appellant (note 71). Lastly, we note that while Government counsel now asserts that "no issue was presented at the hearing * * * which the Government was required to refute,"²⁴ he nevertheless addressed this very question in his posthearing brief (note 71).²⁵

¹⁹ See note 43 and accompanying text in principal opinion.

²⁰ " * * * The additional compensation that the contractor is requesting in this claim is considered arising not from any operations of the utility owner, but simply the failure of the Government to have these objects removed, therefore, creating a different circumstance than could reasonably be anticipated upon bidding the project." (Tr. 243.)

²¹ " * * * We don't have a contract with anybody but the Government, so I have to look to them. * * * (Tr. 852.)

²² Note 51 of principal opinion.

²³ " * * * The fact is that they were still there, and they did hinder our operation * * * " (Tr. 251.) The importance of the issue should also have been apparent from the extensive questioning of Rushing by the hearing member (Tr. 852-58).

²⁴ Government Motion, p. 9.

²⁵ Government counsel states at page 9:

" * * * Appellant was at liberty to question Government witnesses who were present and, through discovery proceedings, to obtain additional documents he may have found neces-

¹⁸ See discussion in principal opinion, note 16, *supra*, and the previous discussion in the text accompanying footnotes 51 and 71 as well as the footnotes themselves. Authorities for resort to an inference in a board decision were not given in the original opinion but are cited herein in note 15, *supra*.

6. In view of Mr. Rushing's repeated admission that representatives of the National Park Service and the Bureau of Public Roads and everyone in the Government involved were diligent and made every effort to get the power poles removed, it was reasonable to assume that the Government was not responsible for the delays in removing the poles.

Mr. Rushing's admission²⁶ must necessarily be limited by the extent of his knowledge as disclosed by the evidence of record. Since it is clear from Rushing's testimony that he did not know who had responsibility for taking the required action,²⁷ there was no warrant for the Board to regard his testimony as absolving all Government personnel from responsibility for delays associated with removing the poles.

7. *The Board's finding that the Government was responsible for an*

(Continued)

sary for some theory of his case. Mr. Chamberlain of the National Park Service and the District Engineer had been identified by Mr. Rushing as being involved, and Appellant was free to request their presence. * * *

While these statements are true, they ignore the fact that inferences are resorted to only where the record as made is in some respects unsatisfactory. See, note 15, *supra* and the portion of the *Helmick* opinion quoted in the text. We have previously noted that the project personnel seemed not to have complete and accurate information pertaining to the utility poles (note 11, *supra*). We also note that Mr. Chamberlain who had told Rushing that the telephone company would not move its line until the paper work was approved (note 51 of principal opinion) was not at the hearing and consequently was not available for questioning by either counsel or by the hearing member. In his posthearing brief Department Counsel interpreted the evidence of record as raising two inferences, of which the Board has found the one adverse to the Government to be the more probable.

²⁶ Tr. 251-52.

²⁷ Tr. 852-86.

indeterminate portion of the delay is extremely harsh, since in a possible law suit the Court of Claims may accept the findings of the Board as conclusive relative to damages, over which the Board concedes it has no jurisdiction.

The reference to the Board's findings being "extremely harsh" overstates the case. While we would not be deterred from making a finding considered to be proper merely because it might affect the Government adversely if an action were subsequently brought in the Court of Claims,²⁸ there is no sound reason to suppose that the questioned decision involves such a case. We note, for example, the references in the opinion to the testimony by Government witness Jordan indicating that the delay in the prosecution of the work was attributable primarily to lack of proper planning on the part of the appellant's personnel,²⁹ as well as the other references to his testimony indicating that the delay in removing the utility poles did not significantly affect the grading subcontractor's operation in any event.³⁰ We also note that the language of the opinion re-

²⁸ If such an action is brought, the appellant would be entitled to a *de novo* hearing. If such a hearing is held, it is inconceivable that the Court would not base its decision on the evidence received where, as here, the Board's decision is based upon inference.

²⁹ Notes 58 and 59 of principal opinion and accompanying text.

³⁰ Tr. 973-74; notes 60 and 61 of principal opinion and accompanying text. Because of the basis upon which our decision respecting claims A and B was grounded, there was no need for the Board to assess the weight to be given to the testimony of Rushing and Jordan except for the finding that the circumstances created an inference adverse to the Govern-

March 27, 1973

flects the fact that the Board's findings adverse to the Government were predicated upon an inference and not by an application of the preponderance of the evidence test ordinarily utilized for establishing an excusable cause of delay.³¹

Also for consideration with respect to the question presented are the decisions by the Court of Claims denying contractor's claims for compensation where Government-caused delays are concurrent or intertwined with other delays for which the Government is not responsible.³² The boards have applied the rule enunciated in such cases and in the cases to which we have previously referred³³ in an even-handed manner, as is well illustrated by the recent decision in *Minimar Builders, Inc.*, note 9, *supra*, in which, at 44,859, the Board stated:

* * * It is hard to determine how much delays was precisely attributable to either party. On balance both parties bear a share of the responsibility. When delays result from a combination of causes, and both parties are at fault to such extent that it is not possible to determine the degree of guilt of each, the Government will lose its right to assess liquidated damages and the contractor will lose the right to collect delay costs. * * *

ment on the question of the propriety of assessing liquidated damages for delayed performance.

³¹ Note 7, *supra*.

³² *Commerce International Co., Inc. v. United States*, 167 Ct. Cl. 529, 543 (1964), and cases cited therein.

³³ Note 8, *supra*.

Accordingly, the Government's motion for reconsideration is denied.

WILLIAM F. McGRAW,
Chairman.

I CONCUR:

SHERMAN P. KIMBALL, *Member.*

EASTERN ASSOCIATED COAL CORPORATION

2 IBMA 71

Decided March 27, 1973

Appeal by Eastern Associated Coal Corporation from an order of Ernest F. Hom, Chief Administrative Law Judge, dismissing as untimely filed Eastern's application for review of an order of withdrawal (Docket No. HOPE 73-449).

Remanded.

Federal Coal Mine Health and Safety Act of 1969: Review of Notices and Orders: Timeliness of Filing

The mailing of an application for review is not determinative of timely filing since receipt is the governing factor.

Federal Coal Mine Health and Safety Act of 1969: Review of Notices and Orders: Timeliness of Filing

Where the delay of receipt of a properly addressed application for review beyond the expiration of the specified filing period is caused solely by the Department's own employee, the application will not be dismissed as untimely filed.

Federal Coal Mine Health and Safety Act of 1969: Review of Notices and Orders: Timeliness of Filing

Unauthorized actions of its own employees cannot be used by the Department as the basis for defeating a substantive right of a party afforded by the Act.

APPEARANCES: Thomas E. Boettger, Esquire, for appellant, Eastern Associated Coal Corporation; Robert W. Long, Associate Solicitor, J. Philip Smith, Assistant Solicitor, and Madison McCulloch, Trial Attorney, for appellee, Bureau of Mines.

**MEMORANDUM OPINION
AND ORDER
INTERIOR BOARD OF MINE
OPERATIONS APPEALS**

On December 3, 1972, an order of withdrawal was issued for the Wharton No. 2 Mine operated by Eastern Associated Coal Corporation (hereinafter Eastern). Eastern's application for review pursuant to section 105(a)(1) of the Federal Coal Mine Health and Safety Act of 1969 was properly addressed to the Office of Hearings and Appeals, 4015 Wilson Boulevard, Arlington, Virginia 22203, in accordance with 43 CFR 4.508(a), on January 5, 1973. The return receipt indicates that the letter was delivered on January 8, 1973, to the mailroom of the Bureau of Mines (hereinafter Bureau) rather than that of the Office of Hearings and Appeals. Both offices are part of the Department of the Interior and are located in the same building. Jane A. Carrico, an employee of the Bu-

reau, was in the mailroom that morning to pick up mail for her office. She inadvertently signed for Eastern's application for review along with mail addressed to the Bureau. Consequently, the application was delayed and not received in the Docket Office of the Hearings Division until delivered by messenger the next day, one day after the expiration of the thirty days allowed for filing an application for review.

The decision of the Chief Administrative Law Judge was based on the wording of the following departmental regulation 43 CFR 4.22:

* * * A document is filed in the Office where the filing is required only when the document is received in that office during the office hours when filing is permitted and the document is received by a person authorized to receive it.

The Judge also cited the Board's decisions in *Freeman Coal Mining Corporation*, 1 IBMA 1, 77 I.D. 149 (1970), and *Consolidation Coal Company, Inc.*, 1 IBMA 131, 79 I.D. 413 (1972), which held that the thirty-day limit for filing an application for review is jurisdictional. Since Mrs. Carrico was not a person officially authorized to receive such applications and the application was not received by the Office of Hearings and Appeals until January 9, 1973, the Judge reasoned that he could not accept it.

Eastern's brief urges (1) that timely posting of a properly addressed application constitutes filing, and (2) that under the facts of this case Eastern's application was

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timely filed. The Bureau challenges the contention that timely posting is sufficient but does not oppose the acceptance of Eastern's application in light of the special circumstances of this case.

Since the rules clearly specify that filing is not complete until received, the Board rejects Eastern's contention that timely posting of a properly addressed application is sufficient. We reiterate that an application is timely filed only when received in accordance with 43 CFR 4.22. Nevertheless, the Board agrees that under the circumstances of this case timely filing did occur. The application was received at the specified street address by an employee of the Department of the Interior who had apparent authority to receive it. That Mrs. Carrico was not officially authorized to receive mail for the Office of Hearings and Appeals is not controlling. Where the delay of receipt of a properly addressed application for review beyond the expiration of the specified filing period is caused solely by the Department's own employee, the application will not be dismissed as untimely filed. Unauthorized actions of its own employees cannot be used by the Department as the basis for defeating a substantive right of a party afforded by the Act.

WHEREFORE, in light of the foregoing, IT IS HEREBY ORDERED:

That the Order of Dismissal of the Chief Administrative Law Judge

IS VACATED and the case IS REMANDED for hearing.

C. E. ROGERS, JR., *Chairman.*
DAVID DOANE, *Member.*

COSMOS ENGINEERS, INC.

IBCA-979-12-72

Decided March 28, 1973

Appeal from Contract No. K99C14200290, Furnish and Install Master Antenna Television System, Gray Hill Project No. LN 33-041, Bureau of Indian Affairs.

Dismissed.

Contracts: Construction and Operation: Changes and Extras—Contracts: Disputes and Remedies: Jurisdiction—Rules of Practice: Appeals: Dismissal

Where a supply contract which provided for the delivery and installation of a television antenna system did not contain a "Suspension of the Work" or other "pay for delay" clause and the Government issued a modification postponing the delivery date because the building in which the system was to be installed had not been completed, the Board dismissed as beyond its jurisdiction the contractor's claim for costs incurred in maintaining a crew in readiness to perform the installation inasmuch as the postponement of the delivery date was not a change within the meaning of the "Changes" clause.

APPEARANCES: Mr. Joseph M. Morrissey, Attorney at Law, Welch and Morgan, Washington, D.C., for appellant; Mr. Charles D. Goldman, Department Counsel, Washington, D.C. and Mr. Barry K. Berkson, Department

Counsel, Albuquerque, New Mexico,
for the Government.

*OPINION BY MR. NISSEN
INTERIOR BOARD OF
CONTRACT APPEALS*

This is a timely appeal from a decision of the contracting officer, dated November 10, 1972, holding that a change in the delivery date of the captioned contract was not within the purview of the "Changes" clause. The effect of the decision was to deny the contractor's claim¹ for alleged standby costs incurred in maintaining a crew in readiness to install the television antenna system required by the contract.

The formally advertised contract (Exh. 53) in the amount of \$7,450 was awarded to Cosmos Engineers, Inc., on March 2, 1972, and required the contractor to furnish and install a master antenna television system at the Gray Hill High School, Tuba City, Arizona. Delivery was to be completed on or before April 30, 1972. The contract incorporated Standard Form 32 (November 1969 Edition) and Specifications for

¹ Although the record does not reflect that a claim in a definite amount has been submitted to the Bureau, the contractor notified the Bureau that a crew was being maintained in readiness to perform the installation and that reimbursement for such expenses was expected (letters of April 19, May 3, 17, 19 and July 3, 1972; Exhibits 10, 12, 16, 17 and 23). The letter from appellant's attorneys, dated October 31, 1972 (Exh. 46), requests a decision as to the contractor's entitlement to compensation for the change in the delivery date. In its Brief in Support of Appeal, dated January 8, 1973, appellant alleges that the additional costs approximate \$18,000. All references are to the appeal file unless otherwise noted.

Master Antenna Closed Circuit TV System. The contract does not contain a suspension of the work or other "pay for delay" clause.

Paragraph 5.2 of the specifications entitled "Submittals" provides in part:

5.2.1 *Installation Plans*: Within 30 days after award of contract and prior to start of installation, the contractor shall submit to the Government Contracting Officer for his approval, shop and/or working drawings with detailed information regarding equipment to be used, circuit attachment of the units and installation of the antenna system.

By letter, dated March 20, 1972 (Exh. 6), appellant pointed out that it had not received the drawings listed in paragraph VII of the specifications. Under date of March 24, 1972, the contracting officer advised appellant that the drawings were being furnished and reminded appellant that it was obligated to furnish installation plans in accordance with the requirements of paragraph 5.2 of the specifications quoted above (Exh. 8). In a telegram, dated March 30, 1972, appellant requested information as to the desired location of the guyed-tower and as to the method of antenna transmission line support and routing from the tower to Room G119 (Exh. 9).

In a letter, dated April 19, 1972 (note 1, *supra*), appellant alleged, inter alia, that it had on hand or had shipped to Tuba City all material for the project and that its field crew was fully mobilized and had been standing by since April 5. Appellant stated that its installation

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plans were complete except for the tower location and transmission line feed but that it had not received a reply to its telegram of March 30.

The building in which a portion of the antenna system was to be installed was being constructed under a separate contract and had not been completed at this time. Modification No. 1, with an effective date of April 26, 1972 (Exh. 3), was forwarded to appellant on a date not certain from the record. Although labeled an administrative change (such as changes in paying office, administrative data, etc.), it, nevertheless, had the block checked indicating that the contractor's signature was required. The modification provided as follows:

MODIFICATION NO. 1 issued because: DELIVERY has to be coordinated with completion of building. Several changes are being executed with the contractor for additional work before the final acceptance of the building by the Government; Therefore, delivery cannot be made prior to June 1, 1972. It is possible that the Government can accept delivery during the month of June; however, delivery cannot be made until you are notified by this office that the building has been accepted by the Government.

The word "contractor" in the modification refers to the contractor constructing the building and not the appellant. Although appellant at first refused to execute the modification upon the ground it had not been signed by the contracting officer (Exh. 12), the modification was signed by the contractor on May 11 and by the contracting officer on May 16, 1972. The letter from the

contracting officer, dated May 16, 1972 (Exh. 15), forwarding the contractor's executed copy of the modification stated in part: "We will contact your office regarding a definite delivery date."

In a letter dated May 17, 1972 note 1, *supra*), appellant raised certain questions concerning the guying of the 80-foot antenna tower and stated that it was understood that the revised delivery requirements would be issued in the form of a change order. Appellant referred to previous correspondence in which the contracting officer had been advised that its field crew had been fully mobilized and standing by ready to proceed with the installation since April 5 not knowing the delivery date which would be required by the Government. Appellant requested instructions as to whether the contracting officer desired that the crew remain in standby status or be assigned to other work and then remobilized after it was notified to proceed with the installation. Appellant apparently received no reply to this letter and followup telegrams of June 7 and 14, 1972 (Exhs. 19 and 18).

Under date of June 20, 1972 (Exh. 20), the contracting officer forwarded to the contractor for signature proposed Modification No. 2 to the contract (Exh. 2). Although providing for the deletion of a statement in paragraph 3.3.3 of the specifications to the effect that the switches shall be push button operated with activated button illuminated and for the disregarding of

the portion of paragraph 3.3.3 "pertaining to the output connection of the video switches to Channel 6," the proposed modification was issued as an administrative change. The final paragraph of the proposed modification is as follows:

Delivery can be accomplished after July 5, 1972, provided shop and/or working drawings have been submitted to the Contracting Officer and accepted (Reference paragraph 5.2.1 *Submittals: Installation Plans*).

Appellant refused to sign the proposed modification (letter of July 3, 1972, note 1, *supra*) and it never became effective.

In a letter, dated June 20, 1972 (Exh. 21), the contracting officer replied to questions concerning the guying of the tower and the adequacy of the system raised in appellant's letters of April 19 and May 19, 1972 (note 1, *supra*). With respect to delivery, the letter merely pointed out that appellant had not complied with the requirement of the specifications that it submit shop and/or working drawings for the approval of the contracting officer prior to commencing installation of the system. Appellant was again reminded of this requirement of the contract in a letter from the contracting officer, dated July 13, 1972 (Exh. 26). The letter concluded with the statement that appellant was delinquent in this requirement of the contract. Appellant furnished a portion of the information with its letter of July 19, 1972 (Exh. 27), pointing out that it could not furnish details as to tower installation until the Govern-

ment furnished information as to the desired location of the tower. Appellant apparently received the information as to the desired tower location in a telephone conversation on July 27, 1972, and submitted a drawing showing installation details by letter, dated July 28, 1972 (Exh. 29). Appellant was notified that the drawing had been approved by the contracting officer's letter of July 31, 1972 (Exh. 30). After certain other technical details of the system had been resolved, appellant was notified that it could proceed with installation under date of August 14, 1972 (Exh. 34).

Appellant completed the installation on or about September 20, 1972 (telegrams of September 19, 1972, Exhs. 40 and 41; letter of September 26, 1972, Exh. 42) and the adequacy of the system is not here in question.²

By letter dated August 23, 1972, appellant's counsel requested a written decision as to whether the change in delivery date of the contract was a change under the "Changes" clause (Exh. 35). This question was answered in the negative in a letter from the contracting officer, dated September 19, 1972 (Exh. 39). In a letter, dated October 31, 1972 (note 1, *supra*), appellant's counsel asserted that the change in the delivery date was not

² Appellant apparently did not install the antenna tower in the exact location shown on its drawing (Exh. 42) and the tower was dismantled and relocated on or after November 16, 1972 (telegram of October 2, 1972, Exh. 43; letters of October 13 and 17, 1972, Exhs. 44 and 45; telegrams of November 13 and 14, 1972, Exhs. 47 and 48).

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part of the original contract and accordingly must fall within the "Changes" clause. The instant appeal was taken from the contracting officer's letter of November 10, 1972 (Exh. 1), affirming that Modification No. 1 was not issued pursuant to the "Changes" clause.

The Government has moved to dismiss the appeal asserting that the claim is for "pure delay" and thus not redressable under the contract in the absence of a "Suspension of the Work" or similar clause.³ The Government cites decisions of this Board⁴ and the Court of Claims⁵ for the proposition that the "Changes" clause does not provide relief for claims based solely on delay of the Government in fulfilling its obligations under the contract. The Government's motion does not refer to Modification No. 1 to the contract and asks that we con-

sider the matter as if the modification had not been issued.⁶

Appellant resists the motion arguing that the cases cited by the Government are inapplicable inasmuch as Modification No. 1 constituted a change in the requirements of the contract.⁷ Appellant cites *Mech-Con Corp.*⁸ for the proposition that a change in the order of contract performance directed by the contracting officer constitutes a change entitling the contractor to an equitable adjustment in accordance with the "Changes" clause.

Decision

Mech-Con Corp. (note 8, *supra*), relied upon by appellant, involved a construction contract providing for certain improvements in an office building. Shortly after receipt of the notice to proceed with the work, the contractor was issued a written directive by the contracting officer in accordance with the "Changes" clause to defer all work

³ Motion to Dismiss of February 8, 1973.

⁴ Among others, *Allison & Haney, Inc.*, IBCA-642-5-67 (February 7, 1968), 68-1 BCA par. 6842 (claim based on delay in furnishing drawings and approving the contractor's shop drawings); *F. H. Antrim Construction Co., Inc.*, IBCA-882-12-70 (July 28, 1971), 78 I.D. 265, 71-2 BCA par. 8983 (claim based in part on Government delay in vacating buildings). See also *John H. Moon & Sons*, IBCA-815-12-69 (July 31, 1972), 79 I.D. 465, 72-2 BCA par. 9601. Cf. *Power City Construction & Equipment, Inc.*, IBCA-490-4-65 (July 17, 1968), 75 I.D. 185, 68-2 BCA par. 7126 (claim based on delivery as Government Furnished Property of misfabricated steel held to be cognizable as constructive change).

⁵ *Cosmo Construction Company v. United States*, 194 Ct. Cl. 559 (1971), holding that this Board had properly dismissed as beyond its jurisdiction the contractor's claim for idled equipment resulting from a changed condition.

⁶ It is, of course, clear that the current version of the "Changes" clause provides that an equitable adjustment may include increased costs of unchanged work resulting from a change and that to that extent the "Rice doctrine" (*United States v. Rice*, 317 U.S. 61 (1942)) is not applicable. Even in the absence of a change in the language of the "Changes" clause, it appears now to be settled that increased costs of unchanged work which are directly attributable to and which flow from a change are properly compensable under the "Changes" clause. *Bruno Law v. United States*, 195 Ct. Cl. 370-453 at 432-33 (1971) and cases cited.

⁷ Opposition to Motion to Dismiss, dated March 6, 1973.

⁸ GSBICA No. 1373 (December 9, 1964), 65-1 BCA par. 4574.

relating to air conditioning and ventilation until October 1, 1964. The specifications provided that work pertaining to air conditioning equipment would be performed during the months of March, April and May. The contract did not contain a suspension of work clause. The Government moved to dismiss the contractor's appeal from the denial of its claim for increased costs resulting from the directive upon the ground the claim was for delay damages and thus beyond the jurisdiction of the Board. The Board denied the Government's motion holding that the deferral of the air conditioning work was not, in the true sense, a delay or suspension of the work, but a change in the order of contract performance directed by the contracting officer which entitled the contractor to an equitable adjustment for the resulting increased costs.

We have no doubt that where the specifications establish an order or sequence for performance of various items of work, a directive from the contracting officer or his authorized representative to change that sequence may properly be regarded as a change in specifications within the meaning of the "Changes" clause.⁹ We think it evident, however, that Modification No. 1 postponed the delivery (installation) date, but did not affect the order or

sequence of performance as was the case in *Mech-Con* (note 8, *supra*), or in *Farnsworth & Chambers Co., Inc.* (note 9, *supra*).¹⁰ Accordingly, the cited decisions do not control this case.

It is clear that the "Changes" clause does not provide for changes in the delivery schedule except insofar as necessary to provide for an equitable adjustment to the contractor for other changes effected under the clause. The acceleration cases are, perhaps, a conspicuous exception.¹¹ Be that as it may, no acceleration claim has been asserted; nor is it apparent from the record that such a claim could properly be asserted.

This brings us to the question of under what authority Modification No. 1 was issued. We think it clear that the modification could have been issued under paragraph 11 of the General Provisions entitled "Default" in order to recognize the extension of the delivery date to which the contractor was entitled due to causes beyond its control and without its fault or negligence. It is,

¹⁰ It is, of course, obvious that the system could not be installed until the site became available.

⁹ See *Farnsworth & Chambers Co., Inc.*, ASBCA No. 5408 (August 31, 1959), 59-2 BCA par. 2329 (order of Contracting Officer requiring mobilization of contractor's personnel for the purpose of performing incidental items of work out of normal sequence held to be a change).

¹¹ These normally involve a request for excusable delay which is improperly denied and directives to perform the work in a lesser time than would be available had the extension been granted. See *Montgomery-Macri Co. & Western Line Construction Co., Inc.*, IBCA-59 & IBCA-72 (June 28, 1963), 70 I.D. 242, 1963 BCA par. 3819 at 19,056, affirmed on reconsideration (June 30, 1964), 71 I.D. 253, 1964 BCA par. 4292; *M. S. I. Corporation*, GSBCA No. 2429 (November 19, 1968), 68-2 BCA par. 7377 and *L. O. Brayton*, IBCA-641-5-67 (October 16, 1970), 77 I.D. 187, 70-2 BCA par. 8510.

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of course, well settled that the mere fact that an excusable cause of delay has been encountered does not entitle the contractor to compensation for increased costs resulting from such delays.¹² Even if Modification No. 1 was not issued pursuant to the "Default" clause, we note that it has been held that generally an officer authorized to make a contract for the Government has implied authority to modify it.¹³ However, for the purpose of deciding the Government's motion, it is unnecessary to decide what contract clause, if any, authorized the issuance of Modification No. 1. It is enough that the modification is not within the terms of the "Changes" clause.¹⁴

We conclude that the claim herein is for "pure delay" and that appellant must seek relief, if any, in another forum.¹⁵

¹² *Montgomery-Macri Co. and Western Line Construction Co., Inc.* (note 11, *supra*) at 19,025; *Marden Corp.*, ASBCA No. 8934 (November 8, 1963), 1963 BCA par. 3938; *John H. Moon & Sons* (note 4, *supra*), on reconsideration (March 23, 1973), 80 I.D. 235, 73-1 BCA par. 235.

¹³ *Whitman v. United States*, 124 Ct. Cl. 464 (1953), and authority cited.

¹⁴ See *Meva Corporation*, IBCA-648-6-67 (August 18, 1969), 76 I.D. 205, 69-2 BCA par. 7838, in particular footnotes 100 and 101 and accompanying text. Cf. *Guy F. Atkinson Company*, IBCA-795-8-69 (January 6, 1970), 69-2 BCA par. 8041 at 37,339, footnote 7: " * * This Board has never viewed delivery dates for Government furnished material as a kind of 'specification' subject to the doctrine of constructive change."

¹⁵ *James Know d/b/a Jak Enterprises*, IBCA No. 684-11-67 (February 13, 1968), 68-1 BCA par. 6854 (contractor's claim for rental on equipment made idle because of failure of the Government to de-energize a transmission line so work could proceed as scheduled dismissed since it was a claim for which no relief was available under the contract).

Conclusion

The appeal is dismissed.

SPENCER T. NISSEN, *Member*.

I CONCUR:

WILLIAM F. MCGRAW, *Chairman*.

SEWELL COAL COMPANY

2 IBMA 80

Decided March 30, 1973

Appeal by Sewell Coal Company from a decision dated November 8, 1972, by Administrative Law Judge Steffey, denying Applications for Review of two Notices of Violation pursuant to section 105 of the Federal Coal Mine Health and Safety Act of 1969.¹

Affirmed.

Federal Coal Mine Health and Safety Act of 1969: Mandatory Safety Standards: Generally

The requirement of 30 CFR 77.215(c) is applicable to refuse piles constructed prior to July 1, 1971, as well as to any constructed after that date.

Federal Coal Mine Health and Safety Act of 1969: Notices of Violation: Elements of Proof

To sustain its burden of proving that spontaneous ignition (or combustion) occurred in refuse piles, the Bureau of Mines must show (1) that certain combustible material was present in each pile; (2) that the piles were compacted in such a way as to permit air to flow through the piles, allowing oxidation to occur; and (3) that the inference of spontaneous ignition was more probable than any other inference which could be drawn from the facts proved.

¹ Hereinafter the Act; P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

Federal Coal Mine Health and Safety Act of 1969: Penalties: Existence of Violation: Evidence

A fact may be inferred from circumstantial evidence, and such fact may be the basis of further inference leading to the ultimate or sought for fact.

Glenn Munsey, Earnest Scott and Arnold Scott v. Smitty Baker Coal Company, Inc., 1 IBMA 144, 162 (Aug. 8, 1972); 79 I.D. 501, 509, Distinguished.

APPEARANCES: Raymond E. Davis, Esquire, and Wesley C. Marsh, Esquire, attorneys for appellant, Sewell Coal Company; Robert W. Long, Associate Solicitor, J. Philip Smith, Assistant Solicitor, I. Avrum Fingeret, Trial Attorney for appellee, U.S. Bureau of Mines.

**OPINION BY THE BOARD
INTERIOR BOARD OF MINE
OPERATIONS APPEALS**

The procedural and factual background of this case is adequately set forth in the Judge's decision.² Notice of Appeal to that decision was filed by Sewell Coal Company (hereinafter Sewell) on November 17, 1972. Motions were filed by Sewell and the Bureau of Mines (hereinafter Bureau) for extensions of time within which to file their briefs. Sewell's brief was timely filed, but the Bureau filed its brief in response too late to be considered by the Board. The contentions by

Sewell are substantially the same as set forth in the Judge's decision.³

In reviewing the entire record in this matter, the Board finds that the Judge committed no error in his interpretation of the construction of 30 CFR 77.214-77.215. However, we believe that some further explanation is necessary of the Judge's determination that spontaneous ignition was the source of the refuse pile fires.

By the very nature of spontaneous ignition (or combustion), proof of its occurrence must necessarily be based on inferences. One explanation of the phenomenon as it relates to coal refuse piles was presented in the record:

* * * This phenomenon results from the flow of air through combustible refuse material and consequent oxidation. When sufficient oxidation occurs, heat is generated, and the combustible components in the pile ignite. (Gov. Ex. 17 at 5.)⁴

It was necessary in sustaining its burden that the Bureau prove (1) that certain combustible refuse material was present in each pile; (2) that the piles were compacted in such a way as to permit air to flow through the piles, allowing oxidation to occur; and (3) that the inference of spontaneous ignition was "more probable than any other inference which could be drawn from the facts thus proven."⁵

² Id. at 2 IBMA 88-89.

⁴ Abbreviated references in the text are to Government Exhibit (Gov. Ex.) and Transcript of Hearing (Tr.).

⁵ *New York Life Ins. Co. v. McNeely*, 79 P.2d 948 (1938), at 954.

² The Judge's decision follows at 2 IBMA 87, 80 I.D. 254.

Was Combustible Material Present in Sewell's Refuse Pile?

The Bureau did not offer the results of any tests of the combustible content of the refuse piles. However, the Bureau's mining engineer gave expert opinion testimony, which was unrefuted by Sewell: "I'd say in the area that I'm talking about in Summersville, Nicholas County, there's other refuse piles that would substantiate that these piles are very susceptible to spontaneous combustion." (Tr. 73) Based on his observation and experience with refuse piles in general, the engineer unequivocally concluded that Sewell's No. 1 and No. 4 plants' refuse piles had conditions which would lead to spontaneous combustion. He observed, "If a pile is burned, this certainly has material in it that will catch on fire." (Tr. 79) It was his ultimate opinion that the source of both of the subject fires was spontaneous combustion. (Tr. 74)

From the foregoing testimony, the Board can properly infer and hereby finds that combustible material was present in both of the subject refuse piles.

Were the Refuse Piles Compacted in such a way as to permit Air to Flow through them Allowing Oxidation to Occur?

The unrefuted testimony of the engineer, who was familiar with the construction of both refuse piles (Tr. 73), requires an affirmative answer to the question.

Is the Inference that Spontaneous Ignition caused the Fires more probable than any other Inference which could be drawn from the Facts Proved?

The answer to this question must also be in the affirmative. No evidence of the existence of other sources of possible ignition⁶ was offered by either party. For example, there was no evidence of lighting in the area, hunter's carelessness, smoker's negligence, or intentional ignition. In fact, Sewell's safety director testified (Tr. 57) as follows:

Q. Mr. Givens, do you know of anyone * * * connected with your coal company, Sewell Coal Company, who would intentionally set fire to the refuse * * * dumps and piles?

A. No, sir.

Q. Do you know how the fires in the refuse piles at Sewell Preparation Plant No. 1 and 4 were started?

A. No * * * not direct knowledge, no.

Inference upon an Inference

It may be said that the Board and the Judge arrived at their decisions by way of an inference upon an inference. We believe that good authority exists⁷ which justifies the process used to arrive at finding the ultimate fact in this case, i.e., that the fires burning in the subject ref-

⁶ See the general discussion of causes other than spontaneous combustion in the Transcript of Hearing at 27, 38, 39, 70 and in Government Exhibit 17 at 5.

⁷ See 1 *Wigmore on Evidence* par. 41 and *Trice v. Commercial Union Assurance Co.*, 397 F.2d 889 (1968), at 891: "A fact may be inferred from circumstantial evidence and such fact may be the basis of further inference to the ultimate or sought for fact."

use piles were ignited spontaneously. The Judge, therefore, arrived at the proper conclusion of law that Sewell had committed the two violations alleged by the Bureau. Thus, the Bureau presented a prima facie case and successfully carried its burden of proof, whereas, Sewell failed to rebut the Bureau's case.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision of the Administrative Law Judge affirming the Notices of Violation and denying the Application for Review IS AFFIRMED.

C. E. ROGERS, JR., *Chairman.*
DAVID DOANE, *Member.*

2 IBMA 87 November 8, 1972

DECISION

Introduction

A hearing on the merits was held November 2, 1972, regarding the Applications for Review filed October 24, 1972, by Sewell Coal Company pursuant to section 105 of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 815 (1970), in the above-captioned proceeding. The Applicant seeks review of two notices of violation both bearing the identification of Notice No. 1 J.M.J. and both dated September 25, 1972. The Applicant filed simultaneously with its Applications for Review a motion for expedition

which was granted on October 27, 1972, in the notice providing for hearing. The ground for expedition is the Applicant's contention that the time allowed for abatement is unreasonable because the fact of a violation has not been established under section 77.215(c) of the Mandatory Safety Standards cited in the notices of violation. Applicant avers that it would be manifestly unfair to require it to perform acts to eliminate a condition to which the Safety Standards do not apply.

Since the Applicant and the Bureau of Mines have both indicated that they will appeal any decision of the Administrative Law Judge which might be unfavorable to their positions in this case, and inasmuch as the time for abatement of the violations, as extended, expires on November 15, 1972, counsel agreed that it would be appropriate in the circumstances for this decision to be issued prior to the time the written transcript of the hearing becomes available. Such expedition is necessary in order that either or both parties will be able to appeal the decision to the Board of Mine Operations Appeals prior to the expiration of the time allowed for abatement. The evidence shows that any withdrawal order which might be issued would require the closing of the Applicant's Preparation Plant Nos. 1 and 4 which have a combined daily output of 4,000 tons of coal. Closing of the preparation plants would also require discontinuance of operations in the underground mines which supply raw coal to the preparation plants.

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The issue inherent in an application for review of a notice of violation is the reasonableness of the time allowed for abatement (section 105 (a) of the Act). Normally such an applicant would have the burden of presenting evidence to show that the abatement period is unreasonable and the applicant's failure to present such evidence would make the application for review subject to dismissal (*Freeman Coal Mining Corp.*, 1 IBMA 1, 25 (1970), 77 I.D. 149, 163). In this proceeding, however, the Applicant's contention that no violation exists, if sustained, would make any time allowed for abatement unreasonable (*Freeman, supra*, at 1 IBMA 27 and 77 I.D. 164). Since it is the Bureau's burden to prove the existence of a violation (*Lucas Coal Co.*, 1 IBMA 138, 79 I.D. 425 (1972)), the Applicant claimed that the Bureau would be unable to sustain its burden and that the Bureau's failure of proof would automatically sustain its argument that no violation exists and would require the vacation of the Bureau's notices involved in this proceeding.

The Board has recognized that the question of whether a violation occurred may be raised and should be given expedited treatment in the factual circumstances which exist in this case because the fact of whether a violation actually occurred is a prerequisite for determining whether the time allowed for abatement is unreasonable (*Reliable Coal Corp.*, 1 IBMA 51, 64 (1971), 78 I.D. 199, 206). Although the Appli-

cant could have presented evidence to show that the extended time allowed for abatement, *i.e.*, until November 15, 1972, is unreasonable, assuming, *arguendo*, the existence of a violation, it did not choose to avail itself of that right and elected instead to rest its case solely on legal and factual arguments to the effect that no violation exists.

The Issues

The Applicant's argument that no violation exists is grounded upon two contentions, one of which is primarily legal and the other of which is essentially factual. The threshold legal argument is that the alleged violations pertain to fires on refuse piles which are not subject to the Mandatory Safety Standards because the refuse piles were constructed prior to the date of July 1, 1971, when Part 77 of the Standards was made applicable to refuse piles. Applicant's supplemental factual argument is that both of the notices of violation should be vacated because the Bureau has been unable to sustain its burden of proving under section 77.215(c) of the Safety Standards that the fires were caused by spontaneous ignition.

Disposition of the Legal Issue

The notices of violation, both bearing the title of "Notice No. 1 J.M.J." and both dated September 25, 1972, cited violations of section 77.215(c) of the Safety Standards in that refuse piles at Sewell Preparation Plant Nos. 1 and 4 " * * * were not covered with clay or

other sealants to extinguish the fire" (Govt.'s Exh. No. 5). Section 77.215(c) reads as follows:

(c) Clay or other sealants shall be used to seal the surface of any refuse pile in which a spontaneous ignition has occurred.

Applicant's legal argument is based on its interpretation of the preceding section 77.214(a) which provides:

§ 77.214 Refuse piles; general.

(a) Refuse piles constructed on or after July 1, 1971, shall be located in areas which are a safe distance from all underground mine airshafts, preparation plants, tipples, or other surface installations and such piles shall not be located over abandoned openings or steamlines.

Applicant contends that section 77.215 must be read in connection with the preceding section 77.214 which specifies the effective date of the Standards and that it is obvious that the Mandatory Safety Standards were not intended to apply to any refuse piles except those which have been constructed since July 1, 1971. The evidence shows that both of the burning refuse piles were constructed before July 1, 1971. Therefore, the Applicant argues that section 77.215(c) is not applicable to its burning refuse piles and that the Bureau's representative has improperly lifted section 77.215(c) out of context and applied it to refuse piles on which it no longer dumps refuse from its preparation plants. Additionally, Applicant notes that the heading of section 77.215 is "Refuse piles; construction requirements" and contends

that the heading clearly shows that the Standards set forth thereunder were designed for guidance in constructing new refuse piles rather than for preventing fires on old refuse piles.

The Bureau's answer to the Applicant's legal argument is that the word "any" in front of the words "refuse pile" in section 77.215(c) is controlling and means that a fire should be extinguished in any refuse pile regardless of whether it is located on an old or a new refuse pile. Also the Bureau claims that the headings in the Safety Standards are for convenience and do not modify the clear language of the Standards.

The Supreme Court of the United States has laid down some general guidelines for interpreting statutes which are helpful in disposing of the Applicant's arguments concerning sections 77.214 and 77.215 of the Safety Standards. In *Crane v. Commissioner of Internal Revenue*, 331 U.S. 1, 6, 13 (1947), the Court stated that the words of statutes " * * * should be interpreted where possible in their ordinary, everyday senses" and " * * * that one section of the [Internal Revenue] Act must be construed so as not to defeat the intention of another or to frustrate the Act as a whole." The Court in *United States v. Bryan*, 339 U.S. 323, 338 (1950), noted that statutes should not be interpreted so as to reach absurd results, and in *United States v. Rice*, 327 U.S. 742, 753 (1946) the Court emphasized that mechanical rules of construction should be avoided where the statu-

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tory language and objective are reasonably clear.

Application of the foregoing criteria to sections 77.214 and 77.215 of the Safety Standards is a relatively simple task. There is no reason to assume that the use of the date of July 1, 1971, in paragraph (a) of section 77.214 was intended to make the remaining paragraphs in that section or any of the paragraphs in section 77.215 inapplicable to refuse piles constructed before July 1, 1971. It would defeat the purpose of the Act and the scope of the Safety Standards to read section 77.214(a) so as to make all the Safety Standards inapplicable to refuse piles constructed prior to July 1, 1971. When the Secretary promulgated the Mandatory Safety Standards for Surface Work Areas of Underground Coal Mines, he provided that they should become effective on July 1, 1971 (36 F.R. 9364 and 13143).

Section 77.1 of the Standards declares that Part 77 sets forth mandatory safety standards for the surface work areas of underground coal mines and at no place in the Standards is there a general ruling that they are to be applicable only to surface work areas of underground coal mines opened after July 1, 1971. On the contrary, section 4 of the Federal Coal Mine Health and Safety Act of 1969 provides that the Act shall apply to each coal mine whose products enter commerce and section 3(h) states that:

(h) "coal mine" means *an area of land and all structures, facilities, machinery,*

tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities; [Italics supplied.]

There can be no doubt from the clear language of the Act that it was intended to apply to surface areas of underground coal mines, including refuse piles. It would lead to an absurd result to hold that fire hazards, noxious gases, and other problems associated with burning refuse piles must be controlled only if they are associated with refuse piles constructed after July 1, 1971.

The unambiguous language of section 77.214(a) is that "Refuse piles constructed on or after July 1, 1971, shall be *located* in areas which are a safe distance from all underground mine airshafts," etc. [Italics supplied.] The date of July 1, 1971, is not used elsewhere in either section 77.214 or section 77.215, so it is obvious that the Secretary concluded that refuse piles existing prior to July 1, 1971, would not have to be hauled to different sites even if their locations on July 1, 1971, might be at places which could be regarded as unsafe distances from various structures of underground mines. That is an understandable limitation when it is realized that each of the burning refuse piles here involved contains approximately

1,500,000 cubic yards of refuse deposited over an area of about 15 acres (Govt.'s Exh. No. 17, p. 47; Joint Exh. No. 1). The fact that refuse piles constructed prior to July 1, 1971, may be left in locations which may not be safe distances from given structures of underground mines is an additional reason for the Standards to require that fires on such "old" refuse piles be extinguished and controlled.

Other aspects of section 77.214 add support to the foregoing conclusions. For example, paragraphs (b) and (c) of section 77.214 refer to "old" and "new" refuse piles when it comes to determining locations for new piles, but paragraph (d) omits any reference to new piles when it speaks of restricting entry of "unauthorized persons" to refuse piles. There is no reason to make paragraph (d) applicable only to refuse piles constructed after July 1, 1971, because burning refuse piles may contain innocuous looking but hazardous soft places into which both children and adults may fall and be burned to death (Govt.'s Exh. 17, p. 13).

There does not appear to be any merit to the argument that the heading "Refuse piles; construction requirements" restricts the applicability of section 77.215 entirely to new refuse piles constructed after July 1, 1971. Paragraph (a) of that section requires compacting of refuse on any pile to minimize flow of air and reduce likelihood of fire. Paragraph (b) prohibits depositing of refuse on a burning pile except

for the purpose of extinguishing or controlling the fire. Paragraph (c), the one at issue here, simply requires that sealants such as clay be used to seal the surface of a refuse pile in which a spontaneous ignition has occurred. Paragraph (d) requires that surface seals be kept intact. Paragraph (g) prohibits the depositing of extraneous combustible material on refuse piles. Thus, it is quite apparent that section 77.215 contains, as the heading indicates, provisions which apply to the construction of refuse piles as well as to the maintenance and control of all refuse piles regardless of whether they were constructed before or after July 1, 1971.

If the Secretary had intended for all paragraphs of both sections 77.214 and 77.215 to be applicable only to refuse piles constructed after July 1, 1971, he could have written the Standards to so state. As the Supreme Court observed in *United States v. Great Northern Railway Co.*, 343 U.S. 562, 575 (1952), "It is our judicial function to apply statutes on the basis of what Congress has written, not what Congress might have written."

It is therefore found and concluded that section 77.215(c) of the Mandatory Safety Standards is applicable to refuse piles constructed prior to July 1, 1971, as well as any constructed after that date.

Disposition of the Factual Issue

Applicant's second argument is that even if the Secretary's representative correctly relied on section 77.215(c) of the Safety Standards

as the basis for the violations cited in the two notices of September 25, 1972 (Govt.'s Exh. Nos. 4 and 5), the Bureau has failed to establish that violations occurred because section 77.215(c) specifically states that sealants shall be used on refuse piles "* * * in which a spontaneous ignition has occurred" and the Bureau's evidence presented at the hearing fails to show that the fire was the result of a spontaneous ignition.

The Bureau's oral evidence consisted of the testimony of three witnesses: the mine inspector who issued the notices, a mining engineer from the Bureau's Mount Hope office, and Applicant's safety director who was called by the Bureau as an adverse witness.

The mine inspector testified that his supervisor had instructed him to apply section 77.215(c) to both old and new refuse piles and that he visited Applicant's Preparation Plant Nos. 1 and 4 on September 25, 1972, for the sole purpose of inspecting refuse piles. He observed fires burning throughout refuse piles at both plants. He took pictures which clearly show the fires in both refuse piles (Govt.'s Exh. Nos. 1, 2, 3, 15, and 16). The pictures were taken on October 31, 1972, but the fires had the same appearance on September 25, 1972, when the notices of violation were given to Applicant. The mine inspector stated that the piles had probably been burning for four or five years and that he could not specifically testify that they had started by spontaneous combustion,

but that he had no reason to think otherwise.

The mining engineer testified that he had visited about 100 refuse piles in recent weeks and that 50 piles located in his district are presently burning. He also stated that while fires in refuse piles can be started by people, such as hunters, the piles are susceptible to spontaneous combustion because they are poorly constructed so that air can circulate through them. He said that sulphur and other elements in the piles are heat productive and that such heat sources plus the oxygen circulating through the piles eventually bring about enough heat to produce spontaneous ignition.

The Applicant's safety director testified that he knew of no fires which had been intentionally started in the refuse piles here involved and that he had no actual knowledge of how they might have started. He agreed that fires are burning in both of the refuse piles cited in the notices of violation.

The Bureau also asked that Bureau of Mines Information Circular IC 8515 entitled "Coal Refuse Fires, An Environmental Hazard" be received in evidence as Government's Exhibit No. 17.¹ According to that publication, 66 percent of all fires in refuse piles are believed to have been caused by spontaneous combustion (Govts. Exh. No. 17, p. 5).

¹ Government's Exhibit No. 17 was received in evidence over Applicant's objection under authority of the Board's ruling in *Reliable Coal Corp.*, 1 IBMA 97 at 111, 79 I.D. 139 (1972).

It is found that concluded on the basis of the evidence of record that violations of section 77.215(c) actually occurred in that the refuse piles were burning on September 25, 1972, and that the evidence justifies the adoption of an inference that the fires were caused by spontaneous ignition. See *Glenn Munsey, Earnest Scott, and Arnold Scott v. Smitty Baker Coal Co., Inc.*, 1 IBMA 144 at 161-162, 79 I.D. 501 (1972).

Ultimate Findings and Conclusions

Inasmuch as the applicant owns at its Preparation Plant Nos. 1 and 4 refuse piles which are defined as "coal mines" subject to the Federal Coal Mine Health and Safety Act of 1969, and inasmuch as those refuse piles were burning on Septem-

ber 25, 1972, in violation of section 77.215(c) of the Mandatory Safety Standards applicable to surface work areas of underground coal mines, the period for abatement provided for in Notices No. 1 J.M.J. and No. 1 J.M.J. (Govts. Exh. Nos. 4 and 5), as extended, was reasonable. Since the grounds given by Applicant in support of its Applications for Review are not sustainable under the law or facts of record, the Applications for Review filed October 24, 1972, in Docket Nos. HOPE 73-330 and HOPE 73-331 are DENIED and Notices of Violation No. 1 J.M.J. and No. 1 J.M.J. both dated September 25, 1972, are AFFIRMED.

RICHARD C. STEFFEY,
Administrative Law Judge.

February 6, 1973

UNITED STATES

v.

R. W. BRUBAKER, ET AL.*

9 IBLA 281

Decided February 6, 1973

Appeal from decision by the Office of Appeals and Hearings, Bureau of Land Management, affirming an Administrative Law Judge's¹ decision declaring placer mining claims null and void in Riverside Contests Nos. 02776, 02777 and 02778.

Affirmed.

Mining Claims: Common Varieties of Minerals: Generally—Mining Claims: Common Varieties of Minerals: Special Value—Mining Claims: Determination of Validity

Where mining claims are located after enactment of the Act of July 23, 1955 for deposits of naturally colored volcanic stone having various colors, the stone being mined, crushed, sold, and used for roofing rock, the deposits are common varieties of stone and are not subject to location under the mining laws after July 23, 1955, where it is shown that similar volcanic stone is of widespread occurrence and that the claimants obtain the same price in the market for the stone as their competitors who produce and sell similar naturally colored volcanic stone. It is not enough to remove the stone in issue from the common varieties category merely to show that it sells for a somewhat higher price than other commonly occurring rocks used for the same purpose that are less attractively colored, such as crushed granite, limestone and pea gravel.

*Not in Chronological Order.

¹ The title of "Hearing Examiner" was changed to "Administrative Law Judge" pursuant to Order of the Civil Service Commission, 37 F.R. 16787 (August 19, 1972).

APPEARANCES: John B. Lonergan, Esq., of Lonergan, Jordan & Gresham, San Bernardino, California, for appellants; George H. Wheatley, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Los Angeles, California, for the appellee.

OPINION BY MRS. LEWIS
INTERIOR BOARD OF LAND
APPEALS

R. W. Brubaker, and others² have appealed to the Secretary of the Interior from a decision by the Office of Appeals and Hearings, Bureau of Land Management, dated December 9, 1969, which affirmed an Administrative Law Judge's decision of September 11, 1969, declaring the Nebocher, Near Pink, Orchid Slope No. 1, and Calico Shores placer mining claims null and void. The decision held that the deposits on the claims are common varieties of stone no longer subject to location under the mining laws.

In their appeal, appellants contend that the naturally colored volcanic stone here involved is not a common variety and is therefore subject to location under the mining laws.

The four claims were located after the enactment of the Act of July 23, 1955, 30 U.S.C. §§ 601-615 (1970), section 3 of which, *Id.* § 611, removed common varieties of stone, *inter alia*, from the operation of the mining laws. Thus, if the deposits

² Appellants are R. W. Brubaker a/k/a Ronald W. Brubaker; B. A. Brubaker a/k/a Barbara A. Brubaker; and William J. Mann a/k/a W. J. Mann.

are held to be common varieties, the claims are void *ab initio*.

We have carefully reviewed and considered the entire case record, including the testimony and documentary evidence presented at both hearings.³ As a result, we concur in the decisions below. Accordingly, we adopt the Bureau's decision of December 9, 1969, a copy of which is attached.

Appellants raised essentially the same arguments as they did in their appeal to the Bureau from the Judge's decision, which contentions were properly disposed of in the Bureau's decision. However, we feel compelled to discuss in more detail the main thrust of their appeal, which is that the Judge and the Bureau erred in comparing stone having certain properties with other stone possessing the same properties, although the evidence shows that the subject stone brings a somewhat higher price as compared with the prices brought by other stone not possessing such properties in acceptable or desired degrees.

We find that each of the four claims involved contains volcanic stone of a different color—pink, gold, lilac and beige. Deposits of similar volcanic stone of varying colors are of widespread occurrence in the desert in the general area of

Barstow, California, where the appellants' mill is located. The varied colors in the rock are imparted by minerals such as iron oxides and hydroxides, iron hydroxide limonite, manganese oxides, and hematite. Appellants quarry the rock by drill blasting, and load it in trucks with skip loaders and haul it to their mill in Barstow where it is crushed, bagged, and sold for \$12 per ton f.o.b. the mill in 80-pound bags. The total production costs are approximately \$10 per ton.

The principle use of the material is for roofing rock, although a small amount is sold for other construction and landscaping purposes. The primary market is Southern California, including Los Angeles. The total market demand for the naturally colored volcanic stone is approximately 3,000 to 4,000 tons per month, of which appellants supply approximately 50%, while their two main competitors supply about 40% and 10% of the market. The competitors also obtain \$12 per ton. Appellants have ten different colors of rock in their line obtained from these and various other mining claims and private lands.

The deposits on the four claims in issue possess properties desirable for a good roofing rock, such as color, hardness, opaqueness, retention of color, desirable crushing characteristics, and chemical resistance to weathering and to the other roofing materials which it is used to protect. However, there are other kinds of commonly occurring rock which are used for roofing rock.

³ The second hearing was held as a result of a remand by the Department for the presentation of evidence as to a comparison of the deposits in question, with other deposits of similar type minerals and whether the market price is significantly greater than that for the common varieties of minerals used for the same purposes, *i.e.*, roofing rock.

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such as crushed granite, limestone and pea gravel, as well as slag—a waste or by-product of a nearby steel mill—although they sell at somewhat lower prices than the naturally colored volcanic stone. Some of these rocks are artificially colored and are sold for roofing rock. The quantity of slag used in the market is approximately 2,500 tons per month, of which about 25% is artificially colored, although the record is totally devoid of any evidence as to the total market demand for crushed granite, limestone and pea gravel.⁴

Limestone and crushed granite in 80-pound sacks sell for \$10.50 and \$8 per ton, respectively, while pea gravel (sold only in bulk) sells for \$1.60 per ton. Slag sells for \$9.45 and artificially colored slag for \$14.85 a ton, the colored slag being priced higher than the rock here in issue.

Witnesses for appellants testified that the colors of the rock in issue made it unique, otherwise it would be a common rock, and that the colors alone bring the higher price. Most buyers are concerned with the color and not with the other properties of the rock. The subject materials are used only on roofs that are visible or where an attractive color is important. Otherwise, common color rocks are used, such as granite, limestone, etc. It is apparent that

much of these latter kinds of rocks are used in the market area, the different colored stones in issue being used to satisfy the aesthetic tastes of individual consumers, architects or stone dealers.

The Judge noted that the contestees and their competitors quarry, process, and sack their material at a cost of \$10 a ton and sell it for \$12 a ton. He stated that the occurrence of such materials are so common that there is little possibility of one deposit having a significantly higher value than another deposit containing stone with similar characteristics, and concluded:

The contestees established that they have deposits of volcanic material which they can process and market at a profit. They did not establish that their deposits have a distinct and special value over and above many other deposits having the same characteristics and useable for the same purposes. Thus the deposits on the four claims must be considered common varieties of stone no longer subject to location under the mining laws. (Italics supplied.)

With reference to the italicized portion of the above quotation, the Bureau in affirming the Judge stated:

* * * From a reading of the Hearing Examiner's [Administrative Law Judge's] entire decision, it is clear that he meant that the mining claimants did not establish that their deposits have a distinct and special value over other deposits *in common supply* in the same market area having the same characteristics and useable for the same purposes. * * * (Italics supplied by the Bureau.)

United States v. Alfred Coleman, A-28557 (March 27, 1962), in-

⁴ It is reasonable to assume that the total monthly demand for crushed granite, limestone and pea gravel, when added to the 2,500 tons of slag used in the market, will at least equal or exceed the 3,000 to 4,000 tons of naturally colored volcanic stone used.

volved mining claims comprising 720 acres located on quartzite deposits of varying colors for building stone. The claimant said he needed all of the claims to be able to provide a complete range of colors of ornamental rock for construction use. This department held that "In view of the immense quantities of identical stone found in the area outside the claims, the stone must be considered a 'common variety' within the meaning of the Act." This finding was upheld by the Supreme Court in affirming the Department's decision. *See United States v. Coleman*, 390 U.S. 599, 603-605 (1968).

Accordingly, we find the subject mining claims to be null and void.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

ANNE POINDEXTER LEWIS, *Member*.

WE CONCUR:

EDWARD W. STUEBING, *Member*.

MARTIN RITVO, *Member*.

DECISION

December 9, 1969

Decision Affirmed

The above-named appellants have appealed from the Hearing Examiner's decision dated September 11, 1969, which determined that the above-identified mining claims are null and void for lack of a discovery

of a locatable mineral pursuant to the provisions of section 3 of the Act of July 23, 1955, 30 U.S.C. § 611 (1964), within the boundaries of any of the claims.

The mining claims in issue were located for a colored volcanic rock after the enactment of section 3 of the Act of July 23, 1955, *supra*, which provides, in pertinent part:

No deposit of common varieties of sand, stone, gravel * * * shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws. * * * "Common varieties" as used in this act does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value * * *.

A hearing was held before a Hearing Examiner on November 21, 1963. By a decision, A-30636 (July 24, 1968), in these proceedings, the Department set aside the Bureau's decisions then under consideration. The departmental decision noted that the crucial issue is whether or not the evidence preponderates that the stone does have physical and chemical properties giving it a distinct economic value within the meaning of the quoted Act. The Department pointed out that in determining whether a deposit has a distinct and special value there must necessarily be a comparison of the deposit with other deposits of similar type minerals. The decision noted that there was no evidence that the material within the claims has some property

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making it useful for some purpose for which other commonly available materials cannot be used. The decision then defined the criteria for determining whether such a deposit of stone is a common or uncommon variety by stating that if the deposit is to be used for the same purposes as minerals of common occurrence, then there must be a showing not merely that the material is marketable, but that some property of the deposit gives it a special value for such use and that this value is reflected by the fact that the material commands a significantly higher price in the market place. Then the departmental decision remanded the contest proceedings, holding:

The present record does not contain sufficiently detailed information upon which a comparison may be made of the economic value of the rocks within these claims with other stone used for the same purposes. The general statements of the witnesses at the hearing as to the economic value of the rocks were not supported by evidence showing differences in market prices between these rocks and other materials being used for the same purposes. Therefore, a further hearing in this case is needed to receive evidence on this issue of the comparative market place value of this stone with other materials used for the same purposes before a final decision can be made as to whether the deposits of stone within these claims are of an uncommon variety as defined under the act and the standard discussed above.

Consequently, a further hearing was held before a Hearing Examiner on December 5, 1968.

The appellants object in their

present appeal to the Hearing Examiner's finding at page 7 of the decision appealed from that they "did not establish that their deposits have a distinct and special value over and above many other deposits *having the same characteristics and useable for the same purposes.*" (Italics supplied by the appellants.) From a reading of the Hearing Examiner's entire decision it is clear that he meant that the mining claimants did not establish that their deposits have a distinct and special value over other deposits *in common supply* in the same market area having the same characteristics and usable for the same purposes. The appellants assert that the Hearing Examiner failed to apply the facts adduced at both hearings to the criteria defined in the *Brubaker* departmental decision, *supra*, for determining whether such deposits of stone come within the category of common varieties of stone pursuant to the quoted Act.

The evidence adduced at both hearings shows that:

Witnesses for both parties at the earlier hearing stated that the material in issue was used for "roofing granules" (1963 Hr. Tr. 11-12, 39, 73, 117). At the subsequent hearing Mr. Brubaker and one of the contestees' witnesses explained that in their opinion "roofing granules" were used in the manufacture of asphalt shingles and rolled goods, and the material on the mining claims in issue was too large to be

suitable for such use (1968 Hr. Tr. 52-53, 79-80, 96). This question of semantics is not significant in these proceedings since the witnesses at both hearings agreed that the crucial use of the colored volcanic rocks on the mining claims is in the build-up roofing industry—two layers of saturated felt are generally laid down and covered with hot asphalt, then colored roofing rock is thrown on top to give the roof color and protect the underlayers from the rays of the sun (1963 Hr. Tr. 13; 1968 Hr. Tr. 79, 123). We shall follow the practice of the Hearing Examiner at the later hearing and refer to the material in issue as being used primarily for "roofing rock," since that appears to be the term used in the build-up roofing industry.

From the evidence, it is clear that although most rock is not suitable for roofing rock purposes (1963 Hr. Tr. 92), there are widespread deposits of different rocks that are practical for such purposes (1963 Hr. Tr. 43; 1968 Hr. Tr. 83, 118). Mr. Brubaker testified that he has had to do considerable exploring to find sources of such rock that is attractive, but he did testify concerning eighteen quarries in the Barstow area in which suitable colored roofing rock is produced (1963 Hr. Tr. 64; Exh. B). The mining claimants' consulting geologist testified that, in his opinion, the colors of the rock in issue made it unique, otherwise he agreed it would be a common rock (1963 Hr. Tr. 132, 135). A wholesale building mate-

rial dealer also agreed that colors alone bring the higher price (1968 Hr. Tr. 120).

The mining claimants have several sources from which to supply the roofing rock they sell. The company quarries some of the rock on a royalty basis, they have acquired some lands as a source of supply, and they have located placer claims in the area for such rock (1963 Hr. Tr. 58). The company sells ten colors of roofing rock (1963 Hr. Tr. 60, 90). The rock on the claims in issue is colored gold, pink, lilac and beige, each claim having a different colored rock (1963 Hr. Tr. 60). To avoid possible trespass charges, the company is not quarrying rock from the Nebocher, Orchid Slope No. 1 and Near Pink claims; they are able to supply most of the colors found on these claims from lands they have purchased (1968 Hr. Tr. 71).

During the hearing held in 1968, Mr. Brubaker showed that there is a market of from 3,000 to 4,000 tons of colored roofing rock a month in the area (Tr. 107-108), that his company sells approximately 1,500 tons of the material a month (Tr. 53, 70), and that his two major competitors produce most of the rest of the rock for the local market (Tr. 62, 116, 119). Brubaker-Mann's two major competitors produce roofing rock from similar materials to that sold by the contestees, and they all sell it for approximately the same price (Tr. 22, 28, 63-63, 102, 119-120). In other words, stone of the same general

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characteristics is sold for approximately the same price by those in the industry (Tr. 108, 119-120). Red and green colored roofing rock sells for \$13 a ton, but there is no such rock on any of the claims in issue (Tr. 55). The pink colored stone on one of the claims in issue has at present a low market demand (Tr. 72). The evidence shows that the mining claimants, and their competitors, sell the type of stones on the claims in issue at the mill at a price of approximately \$12 a ton (Tr. 28, 54-55, 87, 109). There was no explicit testimony concerning the expenses of the mining claimants' competitors, except that one active producer has an appreciable freight advantage over Brubaker-Mann quarries (Tr. 62). Mr. Brubaker showed that he produces the rock at a cost of approximately \$10 a ton (Tr. 54-55). There are several other materials used for the same purposes as natural colored roofing rock, and the testimony of the mining claimants' witnesses was not in accord as to the comparative advantages of one material over another. Mr. Brubaker was of the opinion that colors must not fade (1963 Hr. Tr. 62), while one of his witnesses stated that it was not important if some fading occurred. A stone dealer testifying for the mining claimants stated that he only used colored stone if the roof could be seen, otherwise local gravel or other less expensive rocks were used (Tr. 124-125). The market for natural colored roofing rock goes up and

down, but has been good for the last 20 years (Tr. 114); however, the industry is able to supply the market demand.

A summary of the evidence shows: (1) There are many rocks and other materials used for the same purpose as the rock in issue; (2) the rock in issue sells for no higher price than other attractive stones offered in the market for the same purpose by the contestees and their competitors; (3) there is a sufficient supply of attractive rock of suitable quality from many different deposits in the area so that those in the industry have been able to adequately supply the market demands;¹ and (4) no economic advantage in producing the stone has been asserted over that of similar competing stones in the area. In response to the decision of the United States Court of Appeals for the Ninth Circuit, *McClarty v. Secretary of Interior*, 408 F. 2d 907 (1969), the Department in *United States v. Kenneth McClarty*, 76 I.D. 193 (1969), explained that stone used for the same purposes as more common stone must show a significant economic advantage because of a unique property to come within the category of an uncommon variety of stone. Thus, the Department in its latest *McClarty* decision, *supra*, somewhat developed its explanation, set forth in the depart-

¹ In this connection we note the readiness with which the mining claimants obtained suitable rock of most of the colors found on the claims in issue from other sources when these adverse proceedings were initiated.

mental *Brubaker* decision, *supra*, and stressed in the appellants' statement in support of their appeal, of the criteria for determining whether deposits of rock are an uncommon variety. The appellants have not shown that the Hearing Examiner was in error in finding that the stone in issue is a common variety of stone under the quoted Act and the standards discussed heretofore. Taking the criteria into consideration mentioned in the latest *McClarty* decision, *supra*, it is not enough that the rock in issue sells for a higher price than rock used for the same purpose that is less attractively colored, where there is no showing that the deposits in issue have any economic advantage over other suitable, attractive rock in the area which is commonly available in sufficient quantities to adequately supply the market demands. The contestees were required to offer a preponderance of the evidence to overcome the Government's *prima facie* showing that the material in issue is a common variety of rock, and the contestees have failed to make the necessary showing. The stone in issue is a common variety of stone, and common varieties of stone were not locatable under the mining laws at the times the mining claims in issue were located, nor are such materials now locatable.

Accordingly, the Hearing Examiner's decision determining that the Nebocher, Near Pink, Orchid Slope No. 1, and Calico Shores mining claims are null and void is affirmed.

The above-named appellants have the right of appeal herefrom to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D.C. 20240. The filing fee will be computed on the basis of \$5 for each mining claim included in the appeal. If the appeal covers all mining claims adversely affected by this decision, the total filing fee will be \$20. In taking an appeal there must be strict compliance with the regulations. The appellants must show wherein the decision appealed from is in error.

If an appeal is taken by the appellants, the attorney for the adverse party who must be served is:

Regional Solicitor
United States Department of the
Interior
7759 Federal Building
300 North Los Angeles Street
Los Angeles, California.

FRANCES A. PATTON,
OFFICE OF APPEALS AND HEARINGS

DAVIS L. DANN

Decided April 4, 1973

10 IBLA 221

Appeal from decision (AA 2956) by the Alaska State Office, Bureau of Land Management, rejecting notice of location of settlement claim for an additional entry under the homestead laws.

April 4, 1973

Reversed and remanded.

Alaska: Homesteads—Additional Homesteads—Settlements on Public Lands

A homestead settlement claim for an additional homestead entry under the Act of April 28, 1904 (33 Stat. 527), 43 U.S.C. § 213, may be made for unsurveyed lands in Alaska by a person otherwise qualified who has filed an application for homestead entry on a form approved by the Director, Bureau of Land Management, and made acceptable final proof on his original homestead settlement claim, where the combined area of the two claims does not exceed 160 acres.

APPEARANCES: Davis L. Dann, pro se.

OPINION BY MRS. LEWIS INTERIOR BOARD OF LAND APPEALS

Davis L. Dann has appealed from a decision by the Alaska State Office, Bureau of Land Management, dated October 27, 1971, which declared unacceptable for recordation his notice of location of settlement claim filed pursuant to the Act of April 29, 1950 (64 Stat. 94; 43 U.S.C. §§ 270, 270-5, 270-6, and 270-7 (1970)), for an additional homestead entry under the Act of April 28, 1904, *as amended*, 43 U.S.C. § 213 (1970), and vacated its notice of August 19, 1969, entitled "Claim Recorded."

Dann had filed on June 13, 1968, the notice of location of settlement claim for an additional homestead entry under the 1904 Act, Serial No. AA 2956. The notice described a

tract of land by metes and bounds in unsurveyed sections 16 and 17, T. 4 S., R. 7 E., Copper River Meridian, containing approximately 120 acres and lying contiguous to a tract, containing approximately 40 acres, on which he had previously filed a notice of location of settlement claim for occupancy under the homestead laws, Serial No. AA 801. On May 6, 1969, the Alaska State Office informed Dann that the land description was incorrect and that the filing would be closed if the defect was not corrected within 30 days from receipt of the notice. Dann filed a new location notice with a corrected description on June 25, 1969, whereupon the State Office issued its notice of August 19, 1969, accepting the claim for recordation.

The decision below pointed out that the regulations under the Act of April 28, 1904, *supra*, authorize a person who has not theretofore entered 160 acres but has entered less than that amount to *enter* other and additional land lying contiguous to the original *entry* which, with the land first *entered* and occupied, will not in the aggregate exceed 160 acres (43 CFR 2512.2(a)); that 43 CFR 2512.2(b) states that a person who desires to make an additional *entry* under the 1904 Act must comply with the provisions of 43 CFR 2511.3-1, which regulation provides that applications for public lands in Alaska *subject to entry* must be filed on a form approved by the Director, and that homestead

entry may be made on unappropriated surveyed public lands (43 CFR 2511.0-8).

The decision then held that the lands covered by Dann's notice of location are not open to or subject to entry because they are not surveyed, as unsurveyed lands cannot be entered and the 1904 Act deals specifically with additional entries; also, that Dann is not qualified to make an additional entry because his prior filing AA 801 is not an entry but a homestead location claim on unsurveyed land, and there is no provision in the law or the regulations to allow a homesteader to file an additional homestead settlement claim; and, therefore, his notice of location serialized as AA 2956 should have been declared unacceptable for recordation at the time it was filed.

In his appeal, Dann contends that (1) at the time of filing his original homestead settlement claim, AA 801, on March 9, 1967, he was assured by the land office that he could file on additional contiguous land at any time during the statutory life of the original claim, and that (2) he has been unofficially informed that patents have been issued on similar filings on unsurveyed lands by the land office.

We disagree with the decision below, which relies on provisions of the general regulations pertaining to homestead entries contained in 43 CFR Part 2510 to the effect that a homestead entry can be made only on surveyed lands and that an application for entry must be filed on

a particular form, and on a conclusion that there is no provision in the law or the regulations to allow a homesteader to file an additional homestead settlement claim. It is true that a homestead entry per se cannot be made on unsurveyed lands either in Alaska or the other public land states, and that in either case an application for an entry must be filed on a form approved by the Director. We also concede that there is no specific provision for an additional homestead settlement claim in Alaska. On the other hand, there is no specific prohibition.

The provisions of the regulations cited by the State Office must be read *in pari materia* with the special regulations pertaining to homestead settlement and entry in Alaska contained in 43 CFR Subpart 2567. The homestead laws were extended to Alaska by the Act of May 14, 1898 (30 Stat. 409; 48 U.S.C. § 371), as amended by various Acts. See 43 CFR 2567.0-3. 43 CFR 2567.0-8 states that "[a]ll unappropriated public lands in Alaska adaptable to any agricultural use are subject to homestead settlement, and, when surveyed, to homestead entry. * * *"¹ A person making settlement on unsurveyed land in Alaska on or after April 29, 1950, in order to protect his rights, must file a notice of settlement for recordation in the land office, and post a copy thereof on the land within 90 days after the settlement. 43 CFR 2567.2(b).

An entryman on surveyed lands

¹ Also see 43 CFR 2511.2 and 2511.3-1(b).

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or a homestead settlement claimant on unsurveyed lands must file acceptable final proof of his compliance with the residence and cultivation requirements of 43 CFR 2567.5 within five years from the date of the entry or from the date of recording of the notice of the settlement claim, as the case may be. In the case of a settlement claim, the land included therein may be surveyed without expense to the settler, provided he submits, within the said five-year period, an application to enter on a form approved by the Director and acceptable final proof. 43 CFR 2567.6(a). In such case, the entry is then allowed and approved for patenting. If a settler wishes to secure earlier action in the matter of survey, he may have a survey made at his own expense by a deputy surveyor appointed by the authorized officer of the Bureau of Land Management and, after the special survey has been made, he should file an application to enter as in the case of other settlements on surveyed lands. 43 CFR 2567.6(b) and (c).

The regulations provide that any person otherwise qualified who has made final proof on an entry for less than 160 acres may make an additional homestead entry in Alaska for contiguous land under the Act of April 28, 1904, *supra*, or for non-contiguous land under the Act of March 2, 1889 (25 Stat. 854; 43 U.S.C. § 214) for such area as when added to the area previously entered will not exceed 160 acres. *See* 43 CFR 2567.4(c). As the homestead

laws are applicable to Alaska, including additional entries, we see no reason why a homestead settlement claim for an additional homestead entry under the Act of April 28, 1904, cannot be made on contiguous unsurveyed lands, even though the regulation pertaining to additional entries in Alaska does not specifically provide for additional homestead settlement claims on unsurveyed lands. Neither does the regulation explicitly prohibit them. Therefore, we hold that additional homestead settlement claims may be made in Alaska under proper circumstances.

We have examined the case file of Dann's original settlement claim AA 801 and find that he has filed final proof and a homestead entry application on approved Bureau of Land Management Form 2211-1 (October 1964). A field report recommended that the land be surveyed and the claim proceed to patent. The proof has been accepted and instructions have been prepared for U.S. Survey No. 4097 to accommodate the claim. As Dann has filed acceptable final proof on his original claim AA 801, his notice of location for an additional claim, AA 2956, is acceptable and should be recorded in the absence of any other objections appearing. If he files acceptable final proof on it within the statutory period, he will be entitled to make the additional entry.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of

the Interior, 43 CFR 4.1, the decision appealed from is reversed and the case record is remanded to the local Bureau of Land Management office for further appropriate action consistent herewith.

ANNE POINDEXTER LEWIS, *Member*.

WE CONCUR:

DOUGLAS E. HENRIQUES, *Member*.

MARTIN RITVO, MEMBER, *Concurring specially*.

Martin Ritvo, concurring.

While I concur in the result reached in the main opinion, I believe a few additional comments may be advisable.

First considering the amount of unsurveyed land in Alaska and number of claims initiated by settlement, we find it unusual that there is no provision in the regulation or any decision pertaining to this situation. Nevertheless, there must have been a practice of either allowing or disallowing additional entries of unsurveyed land. The only reference that our research has uncovered is found in *Margaret L. Gilbert v. Bob H. Oliphant*, 70 I.D. 128 (1963). The decision states:

The record shows that Oliphant filed notice of location of his original homestead entry, Anchorage 027911, on unsurveyed land on September 29, 1954, and that his additional entry, Anchorage 028930, was allowed April 22, 1955. * * *

Apparently neither the contestee nor the various offices of the Department through which the contest and appeal passed found anything objectionable in allowing an addi-

tional "entry" to be made to a settlement claim for unsurveyed land. We take this instance as a reflection of what was most likely the general understanding.

We also note that a settler is not required to file a notice of initiation of his settlement claim on unsurveyed land. Although the general provision of the pertinent statute, 43 U.S.C. § 270 (1970), says that he "shall" do so, another provision, 43 U.S.C. § 270-6, limits the effect of nonfiling to loss of credit for residence and cultivation prior to filing of the required notice, or a petition for survey, or an application for homestead entry.¹

Thus, absent recording, a settler could enlarge his claim merely by changing the boundary markers. The practical advantage of recording, however, limits his opportunity to add to his entry so informally, so that a recorded settlement claim becomes much more akin to an allowed

¹ As to the possible difficulties that failure to file a timely notice may cause a settler, see *Harold N. Aldrich*, 73 I.D. 70, 75 (1966):

"* * * Since the late filing of a notice of settlement does not extend the 5-year period within which a settler must demonstrate compliance with the requirements of the homestead law, Aldrich would have had left only to May 18, 1964, to complete his obligations. The recording act does not purport to extend the life of a homestead settlement claim or to waive the regular obligations. A settler who files late loses credit for his residence and cultivation but is not excused from doing the requisite cultivation and residence. That is, if he filed in the third year after settlement, he can get no credit for the second year's cultivation, yet he cannot obtain a patent without having performed it. It would seem, therefore, that any settler who postpones the filing of his notice for a considerable time may find that he not only has lost credit for prior cultivation and residence but that he has also made it impossible for him to satisfy the requirements of the homestead law. * * *"

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entry. This similarity supports the conclusion reached in the main opinion.

We would, however, add as a final caution the reminder that the filing of a notice of location does not establish any rights in the land. It is not a bar to a later finding that the land was not open to entry and that no rights were established by settlement.

Vernard E. Jones, 76 I.D. 133, 136, 137 (1969), discusses the matter in detail:

The reasons offered by the Bureau for its action in this matter and the reasons advanced by appellant for his appeal from that action suggest some misapprehension on the part of both parties with respect to the nature of a notice of location or settlement in Alaska and the effect of its filing in a land office. Both parties appear to have viewed appellant's notice of location as the equivalent of an application for land which, in the view of the Bureau, was subject to rejection upon a determination by that agency that the land applied for should not be disposed of in the manner contemplated in the filing of the notice and which, in appellant's view, upon its approval by the land office, authorized his entry upon the land. Such is not the nature of a notice of location.

Except in Alaska, appropriation of, or entry upon, the public domain under the nonmineral public land laws is authorized only after application has been filed, the land applied for has been classified as suitable for the desired usage, and entry has been formally allowed. A determination by this Department that a tract of land has a greater value for some use other than that proposed by an applicant constitutes sufficient grounds for rejection of the application. In Alaska, however, such a determination is not a prerequisite to settlement upon

the public lands. If land is vacant and unappropriated, that is, if no prior rights have been established and if the land has not been withdrawn or otherwise closed to operation of the public land laws, any person who is qualified to enter under those laws may, without seeking or obtaining permission from the land office, occupy or settle on a tract of land and, through compliance with one of the applicable laws, establish in himself rights in the land which will ultimately entitle him to receive patent to the land. It is immaterial in such a case that, in the view of the land office, the land may have greater value for some other purpose and that it may be, in fact, wholly unsuited to the type of settlement or occupancy that was made. [Footnote omitted.]

Although prior approval by the land office is not needed in order to settle upon land in Alaska, a settler is required by the act of April 29, 1950, 48 U.S.C. secs. 371, 461a (1958), within 90 days after settling upon land, to file in the appropriate land office a notice of location or settlement. The purpose of such notice is to provide the land office with information needed for the administration of public lands and to allow the settler to receive credit for his occupancy and use of the land, the statute expressly providing that, unless notice is filed in the time and manner prescribed, credit will not be given for occupancy maintained prior to the filing of notice of location or an application to purchase. The filing of a notice of location, however, does not establish any rights in land, the establishment of such rights being entirely dependent upon the acts performed in occupying, possessing and improving land and their relationship to the requirements of the law under which the settler seeks to obtain title. See *Anne V. Hestnes*, A-27096 (June 27, 1955); *Loran John Whittington, Chester H. Cone*, A-28823 (August 18, 1961); *Albert L. Scepurek*, A-28798 (March 27, 1962).

The actual appropriation and occu-

pancy of land generally are accomplished facts at the time a notice of location is filed. Thus, the acceptance of a notice of location for recordation is not the allowance of an application for land but is, in reality, nothing more than the acknowledgement that the initiation of settlement rights as of a particular date has been claimed and a noting of the land office records to reflect the existence of that claim, and the acceptance for recordation of a notice of location is not a bar to a subsequent finding that, in fact, no rights were established in the attempted settlement. See *Charles G. Forck et al.*, A-29108 (October 8, 1962). It is clear, then, that the acceptance of appellant's notice of location for recordation on September 20, 1966 did not preclude a later determination that the land which appellant claimed was not open to entry and that no rights were established by his settlement on the land.

ESTATE OF ANGELINE TAKES THE SHIELD, LAMBERT, IRON BEAR

2 IBIA 1

Decided April 17, 1973

Appeal from Judge's decision after rehearing, denying claim of Lucille Hall as creditor of the estate for care of the decedent and a petition by her attorney for attorney's fee.

Affirmed.

165.2 Indian Probate: Claim Against Estate: Care and Support

In the absence of an expressed or implied contract providing for compensation for personal services rendered the decedent relative, such services are presumed gratuitous.

165.1 Indian Probate: Claim Against Estate: Allowable Items

A claim for attorney's fee is not allowable as a charge against the estate where

the services were performed on behalf of the attorney's client and were neither on behalf of the estate nor of benefit to the estate.

165.1 Indian Probate: Claim Against Estate: Allowable Items

A claim for attorney's fee by an attorney who successfully or unsuccessfully represented a client whose interests were in opposition to creditors of the estate and the heirs at law is a private business matter between attorney and his client and not a proper claim against the estate as an administration expense.

APPEARANCES: Robert Hurly, Esquire, for the Appellant; no appearance entered by or on behalf of Carmelita Lambert Eagle Boy, Petitioner for rehearing below.

OPINION BY MR. SABAGH INTERIOR BOARD OF INDIAN APPEALS

Lucille Hall, granddaughter of decedent, appeals from the decision and order of the Administrative Law Judge after rehearing, disallowing her claim for care of the decedent Angeline Takes The Shield, Lambert, Iron Bear, and further, disallowing the claim of her attorney, Robert Hurly, for attorney's fee.

Angeline Iron Bear died April 7, 1970, at the age of 72 years. A hearing was held on June 26, 1970, by Hearing Examiner, Indian Probate, David J. McKee,¹ and the record was certified to the Secretary of the

¹ Examiner McKee, after the hearing, but before rendering an initial decision became Chairman of the Board of Indian Appeals, which necessitated certification to the Secretary for initial decision. Mr. McKee took no part in the decision of this case.

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Interior for decision. In his decision of April 7, 1971, the Secretary found, *inter alia*, that the will of the decedent was entitled to approval as her last will and testament. He further found that the decedent was provided care under circumstances entitling the appellant to compensation; and further that care was provided for decedent's late husband and for the child, Robert Desjarlais, under circumstances entitling the appellant to compensation from the estate. The Secretary pursuant to his order approved the will and the claim of the appellant, Lucille Hall, for care provided, in the sum of \$9,800.

Carmelita Eagle Boy, a cousin of the appellant timely filed a petition for herself and for Magdeline Stretches Himself, both heirs in the matter, for rehearing of the order proving the will and the decree of distribution set forth in the Secretary's decision of April 7, 1971. In justification of the petition the petitioner alleged that the Notice of Hearing to Determine Heirs or Probate Will dated May 8, 1970, did not include a statement of the claim for care submitted by Lucille Hall, and as a consequence she the petitioner was not ready to rebut the testimony given by the appellant; nor did the Notice advise the petitioner that she could be represented by legal counsel.

On June 25, 1971, an order granting rehearing was issued by the Director, Office of Hearings and Appeals, wherein it was found that the

petition was timely filed and that it showed merit. The order further found "that because of the unavailability of the Examiner, David J. McKee, who conducted the hearing, a full rehearing should be conducted *de novo* as to the fact of and the legal validity of the claim of Lucille Hall." It was ordered that rehearing be granted for rehearing of those issues presented by the petition. The Judge having the Fort Peck Indian Reservation in Montana within his assigned territory was given jurisdiction to conduct the rehearing. Rehearing was held on September 23, 1971, in Poplar, Montana, by Judge William E. Hammett. The petitioner and the appellant were both represented by counsel. On March 6, 1972, the Judge issue an order disallowing the appellant's claim for care and the claim for attorney's fee. Appellant filed an appeal to this Board on July 19, 1972.

Seven grounds have been offered in support of this appeal which are as follows:

1) The decision exceeds the authority and jurisdiction of the Examiner under the Rehearing Regulations, in that the decision is not based on any issue raised by the Petition for Rehearing.

2) The Examiner exceeded the jurisdiction and authority given him by the Director in the June 25, 1971, Order for Rehearing which specifically limits the Examiner to Rehearing "all issues presented by the Petition."

3) The April 7, 1971, decision of Rogers C. B. Morton, Secretary of the Interior, expressly considered the very facts considered by Examiner Hammett,

and the Secretary of the Interior, on these same facts, expressly determined that "the requirements of 25 CFR 15.23 (d) were met in that the care was given on a promise of compensation and that compensation was expected." And Examiner Hammett is without jurisdiction or authority to overrule the Secretary of the Interior on this point.

4) The Examiner exceeded his authority and jurisdiction in attempting to act as an appeal court and to expressly overrule the decision of April 7, 1971, of the Secretary.

5) The decision of the Examiner is not supported by the facts, and the testimony quoted by him clearly shows that care was given on a promise of compensation and that compensation was expected.

6) The decision of the Examiner is based on a mistake in law in that in order to reach his decision, the Examiner has completely disregarded the dictionary and common and legal meanings of the words "promise of compensation", and a correct interpretation of the meaning of these words would lead to the allowance of Appellant's claim.

7) The decision of the Examiner is a miscarriage of justice and denies justice and equity to appellant.

The petition for rehearing, among other things, indicated that the petitioner was not advised of the claim of Lucille Hall in the Notice of Hearing to determine Heirs and Probate Will, because of which she was not ready to rebut the testimony given by Lucille Hall nor was she advised that she could be represented by counsel. Moreover the only available attorney was out of the area and unavailable. The petition further stated that the appellant attempted to coerce the decedent into executing a new will. The petition enumerated certain periods during

which the appellant could not have taken care of the decedent or her late husband.

It is noted that the petitioner was not aware of the technical requirements and procedures necessary for a proper preparation or presentation of her case, and was not forewarned in the Notice of Hearing to Determine Heirs and Probate Will because the claim was not made until hearing was in progress.

A rehearing will be granted where the original hearing did not conform with the standards of a full opportunity to be heard embodied in the Administrative Procedure Act. *Estate of Little Toby (Tobin)*, A-24519 (February 14, 1947).

The petitioner did not have the requisite knowledge, background, or understanding and was not represented by counsel. Under such circumstances, the specific allegations technically required by the regulations may be inferred from the petition, the record, and the subsequent incidents and circumstances of the case. *Estate of Lucille Mathilda Callous Leg Ireland*, 1 IBIA 67, 78 I.D. 66 (1971).

We cannot agree with the appellant and conclude that the Judge did not exceed his authority and jurisdiction with respect to the issues raised by the Petition for Rehearing.

We turn now to consideration of the claim of Lucille Hall for care under 25 CFR 15.23(d) which provides:

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Claims for care will not receive favorable consideration unless clear and convincing proof is offered showing that the care was given on a promise of compensation and that compensation was expected.²

The Department long ago concluded that a decedent's promise to give land to a claimant in return for care and support cannot be construed as "compensation" within the meaning of that term in 25 CFR 15.23 (d). *Estate of Frank Puck-keshin-no*, IA-1373 (March 15, 1966); *See also Estate of Albert Windy*, A-25452 (September 21, 1948).

Departmental decisions have consistently held that services performed by persons in family relations are presumed to be gratuitous and in the absence of a contract, expressed or implied, providing for payment of compensation for the services rendered the decedent, no claim for compensation out of the estate may be allowed. *Estate of Ralph Old Dog*, IA-11 (October 5, 1949); *Estate of Little Toby (Tobin)*, A-24519 (Supp.) (November 24, 1947).

The record on rehearing established that:

1) The appellant, her sisters and brothers, lived with and were cared for and supported by the decedent from the time the appellant was 3 years old, appellant's mother having died in or about 1948.

2) The appellant's sisters and brothers left the decedent's home in

or about 1959 to marry or go their separate ways, but that the appellant continued to live with the decedent Angeline Iron Bear and her late husband, Charles Iron Bear, until the demise of Angeline on April 7, 1970, except for several periods of absence.

3) The decedent wanted the appellant to continue school; that she in fact went to vocational school from late fall 1959 to the spring or summer of 1960, when she dropped out.

4) The appellant began receiving welfare payments in or about 1966.

5) The appellant gave birth to four children while living with the decedent, one of which was supported by the decedent.

6) The decedent received \$100,000 on an oil lease which she shared with the grandchildren including the appellant.

The appellant testified that she dropped out of school while in the 9th grade in 1959 to take care of her grandfather, Charles Iron Bear. He did not ask her to drop out of school, nor did she expect to be compensated for the alleged care she gave the grandparents.

The appellant further testified that she did not file a claim against the grandfather's estate upon his death because the decedent, Angeline Iron Bear, told her that Charles Iron Bear told her that he wanted the appellant to have all of the Iron Bear land and that the decedent Angeline Iron Bear would leave

² The regulation has been superseded by a new regulation which is substantially the same. See 43 CFR 4.250 (d) (1972).

this land to the appellant. This testimony was uncorroborated. No one was present during this conversation, nor did anyone hear the decedent make such a promise.

Further, the appellant testified that two weeks before her death the decedent told her that she wanted to change her will. This testimony was corroborated by a social worker with the Bureau of Indian Affairs. A memorandum prepared by the appellant incorporating the changes the decedent wished to make in the will was accepted into evidence as Exhibit A during the initial hearing. However, there was no mention in it of wishing to give all of the Iron Bear land to the appellant. Angeline Iron Bear died without amending or altering her will to include the contents of Exhibit A.

Pertinent portions of appellant's testimony taken from the transcript of the initial hearing held on June 26, 1970, are hereinafter set forth:

Q. Lucille what is the nature of the claim you are filing against this estate?

A. For the care of my grandmother and her husband. (Tr. 18.)

Q. How long did you provide care for the deceased, Angeline Iron Bear?

A. Since '59.

Q. What kind of care did you provide for her?

A. Oh, I drove for her, drove for her and cleaned her house and cooked for her and ironed her clothes. (Tr. 19.)

Q. How did you come to care for Angeline and her husband?

A. Well, my grandfather was going blind in one eye and I dropped out of

school to take care of him. My grandmother was in the hospital. (Tr. 20.)

Q. Was *** did you do this on your own or did they ***?

A. Well, there was no one else that would do it so I quit school.

Q. Did he specifically ask you to quit school or did you ever have any conversation with him about quitting school to take care of him, or with Angeline?

A. No, I just did it.

Q. Was this Charles Iron Bear?

A. Yes.

Q. How long was he alive?

A. Until '65.

Q. You provided the same kind of care for him as you did for Angeline?

A. Yes.

Q. Did you file a claim in his estate?

A. No.

Q. Why not?

A. Because, when he gave all of his land to my grandmother and to one of his grandsons and he said when grandma died she was supposed to give me all of the Iron Bear land for taking care of him.

Q. Did he tell you this?

A. He told my grandmother that and my grandmother told me that she was going to leave all the Iron Bear land to me. (Tr. 21.)

Q. When was it that you made these arrangements with Angeline concerning your compensation for care? How long before she died?

A. What do you mean?

Q. That Exhibit A doesn't have any date on it.

A. Do you want to know when I made that. After my grandfather died she told me she was going to leave me that Iron Bear land for taking care of him. (Tr. 24.)

Q. For taking care of him?

A. Yes.

Q. Did you have any arrangements with her for her care?

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A. She gave me a piece of land for herself.

Q. This is satisfactory to you?

A. Yes.

Q. Then the \$9,800 would all be chargeable to the care you gave her husband would that be right?

A. Well, for both of them.

Q. How long was it before she died did you make up this paper Exhibit A?

A. About two weeks before she died. (Tr. 25.)

At the rehearing, attorneys for the petitioner and appellant stipulated that the matter of the claim of Lucille Hall could be heard and considered for decision on the record as a whole, including the evidence adduced at the first hearing of June 26, 1970.

Pertinent portions of appellant's testimony taken from the transcript of the rehearing held on September 23, 1971, are hereinafter set forth:

Examiner * * * Did you ever have any agreement with your grandmother as to any fixed amount of money that she would pay you for taking care of the children or taking care of her husband?

A. No. (Tr. 84.)

Q. Did you take care of her in expectation that you would receive something for taking care of her?

A. Well I was taking care of her and she told me that she was giving me that land cause my grandfather was gonna give it to me. (Tr. 84, 85.)

Q. Ok. Did you understand that it would be land that she would leave to you by will or land that she would give to you during her lifetime?

A. Land that she would give me in her will. (Tr 85.)

The record falls far short of establishing any understanding on the part of the appellant and decedent

that the appellant's services were rendered in expectation of compensation. The services rendered between 1959 and 1970 consisted of chauffeuring, washing, cleaning and cooking. It is conceded that the appellant did render services of this nature. However, during the entire period covered by the claim, no compensation for such services was paid nor was it shown that the appellant at any time during that period asserted a claim for compensation. In her testimony taken at the initial hearing and elaborated upon on rehearing, the appellant stated in positive terms that she made no agreement with the decedent or her grandfather, and that she took care of her grandfather because there was no one else that would do it. The uncorroborated oral promise of the decedent made a few weeks before her death to leave all of the Iron Bear land to the appellant is regarded at most as only an expression of her testamentary intention, which would be subject to change at any time. This is further supported by the evidence adduced at the rehearing to the effect that the appellant was brought up by the decedent from early childhood, who fed, clothed and took care of her, her sister, brothers, and appellant's own child, without expecting anything in return. In addition to all this, the appellant received a share of \$100,000 received by the decedent on an oil lease, and, was named as a beneficiary in her will.

We are obliged to conclude that there is no clear and convincing evidence in the record, express or implied, showing that the grandfather or the decedent promised to compensate the appellant for the care rendered, although appellant may have expected it.

We further conclude that the claim for attorney's fees is not a proper claim against the estate of the decedent since it is a private business matter between the appellant and her attorney. *See Estate of John J. Akers*, 1 IBIA 246, 79 I.D. 404 (1972).

We find no merit to any of the other contentions raised against the decision of the Judge after rehearing.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Judge's decision denying the claim of Lucille Hall for care in the amount of \$9,800 and the claim of Robert Hurly, Esquire, for attorney's fees is hereby **AFFIRMED**.

This decision is final for the Department.

MITCHELL J. SABAGH, *Member*.

I CONCUR:

DAVID DOANE, *Alternate Member*.

**APPEAL OF F. H. ANTRIM
CONSTRUCTION CO., INC.**

IBCA-914-6-71

Decided April 20, 1973

Contract No. 14-20-0150-946, Project Number LH 54-581, Santa Rosa School, Santa Rosa, Arizona, Bureau of Indian Affairs.

Denied.

Contracts: Construction and Operation: Actions of Parties—Contracts: Construction and Operation: Drawings and Specifications—Contracts: Formation and Validity: Authority to Make

The Board denies a construction contractor's claim for the cost of constructing a dike which was not a contract requirement where it finds: (i) that the dike was constructed of excess material from a sewage lagoon, excavation of which was a contract requirement; (ii) a reasonable construction of the contract would permit the contracting officer to direct the placement of excess material from the lagoon at any place within one-half mile of the site and no part of the dike was in excess of one-half mile from the site; (iii) construction of the dike was not ordered or approved by anyone having authority to commit the Government; and (iv) the contractor failed to protest to the contracting officer when the alleged extra work was performed.

Contracts: Construction and Operation: Actions of Parties—Contracts: Construction and Operation: Changes and Extras—Contracts: Disputes and Remedies: Burden of Proof

A contractor's claim for the cost of repairing a lagoon which was allegedly damaged because a dike not required by the contract channeled floodwaters from a rainstorm into the lagoon was denied where the evidence did not establish Government responsibility for the existence of the dike, a portion of the damage was attributable to an open sewer trench which was the contractor's responsibility and the evidence did not establish that the dike was a principal causative factor

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in flood damage to the lagoon. Under the Permits and Responsibilities clause (Article 12 of Standard Form 23-A, June 1964 Edition), the contractor is responsible for the work until completion and final acceptance.

APPEARANCES: Gardiner Johnson, Attorney At Law, Johnson & Stanton, San Francisco, California for the Appellant; Barry K. Berkson, Department Counsel, Albuquerque, New Mexico for the Government.

OPINION BY MR. NISSEN
INTERIOR BOARD OF
CONTRACT APPEALS

On September 25, 1967, F. H. Antrim Construction Company, Inc., contracted with the Bureau of Indian Affairs to construct the Santa Rosa School and related facilities at Santa Rosa, Arizona.¹ The contract amount, as adjusted by change orders, was \$2,176,979.18.² The contractor substantially completed the project on November 15, 1968, and final acceptance was given by the Government, effective June 2, 1969.³

The construction of a sewage lagoon was a required part of the project work. The appellant's two claims are based on alleged extra work in connection with the sewage

lagoon. Although the claims arise from events occurring in January and July of 1968, they were first submitted to the contracting officer by letter dated November 17, 1970.⁴ The first claim is in the amount of \$17,479. Specifically appellant alleges that it was required by the Government's project inspector to deposit waste materials excavated from the sewage lagoon along the northern property line of the project and there construct a dike not called for by the specifications.⁵ The second claim states in effect that the dike so constructed channeled floodwaters from a rainstorm into the lagoon and that appellant incurred costs totaling \$35,501 in "removing mud, reshaping and compacting."⁶

The Contracting Officer denied the first claim, finding that the work was within the terms of the contract and that the dike was not constructed at the direction of the Gov-

⁴ Exhibit 11. There is no explanation in the record for the delay in submitting the claims.

⁵ Complaint, dated June 21, 1971. Although the claim as stated in the complaint is limited to construction of the dike, it is clear that costs claimed (\$17,479) include costs of moving material from the lagoon to the area at the drainage ditch in the northwest corner of the project site (claim letter of November 17, 1970, note 4 *supra*). The letter states at page 3: "Approximately 12,000 cubic yards of excavated material was [sic] placed in the dike and the area at the drainage ditch." The sum claimed was computed on this yardage.

⁶ Complaint, dated June 21, 1971. Appellant also alleged that necessary repairs to the lagoon were used as an excuse to delay final acceptance of the project and that the cost of these delays (at least two months) should be paid as part of the claim (claim letter of November 17, 1970 (note 4, *supra*)). This contention has been abandoned since it was not mentioned at the hearing or in appellant's post hearing brief, which is labeled "Opening Brief."

¹ We have previously dismissed as beyond our jurisdiction certain of the contractor's claims under this contract: *F. H. Antrim Construction Co., Inc.*, IBCA-882-12-70 (July 28, 1971), 78 I.D. 265, 71-2 BCA par. 8983.

² Findings of Fact and Decision, dated May 21, 1971, p. 4. The contract included Standard Form 23-A (June 1964 Edition) with modifications not pertinent here.

³ Letter of February 24, 1970, Appeal File, Exhibit 6. References are to the appeal file unless otherwise noted.

ernment.⁷ He characterized the storm damage as an "Act of God" and concluded that the damage occurred because "the contractor failed to take measure [sic] to protect the completed work." (Findings, p. 27.) Accordingly, he also denied the second claim.

Extra Dike Claim

The disputed dike⁸ is represented by a red pencil line marked on Sheet No. 1 of 16, Drawing No. SP-365 (App's. Exh. 1), hereinafter "Key Sheet," by Mr. Antrim and labeled by him "Diversion Dike" (Tr. 32-34). The dike extended from a point near the southwest corner of the sewage lagoon in a northwesterly direction,⁹ parallel to a fence along

the north property line near to a point in the northwest corner of the project site identified on the Key Sheet as Property Corner -1.¹⁰ Mr. Antrim testified that the dike was approximately 2,000 feet long; an average of 20 feet wide, and 3 feet high (Tr. 33, 34, 46). He estimated that from 5,000 to 6,000 cubic yards of earth excavated from the sewage lagoon were placed in the dike (see note 5, *supra*). The Key Sheet indicates that the fence referred to above is 1,630 feet long and the dike extended an indeterminate number of feet eastward beyond the corner post (Property Corner -3) where the fence extended in a northeast-erly direction.

The sewage lagoon is composed of two cells (Cell No. 1 and Cell No. 2), Cell No. 2 being immediately to the north of Cell No. 1. The lagoon area was approximately 660 feet by 330 feet. The principal portion of the unexcavated lagoon area was at elevations 1817 and 1818 while a portion was at elevation 1819 (App's Exh. 2). The contract required that the cells be excavated to an elevation of 1805.50.¹¹

Although it appears that excava-

Findings and Decision, page 27. He relied upon provisions of the specification which appear to give the Government an option of having the material disposed of anywhere within one-half mile of the site (Findings, page 18). Division 2 of the specifications is entitled "Site Work." Section C of Division 2 is entitled "Earthwork For Utilities" and Paragraph 4 of Section C is entitled "Borrow." Subparagraph 2C.4.c. provides:

"Disposal: Excess material produced by grading and excavation and not usable nor needed in the filling or backfilling shall be disposed of in the nearby vicinity (within ½ mile of the site) as directed."

Paragraph 6 of Section C (Earthwork For Utilities) is entitled "Earthwork For Lagoons." Subparagraph 2C.6.b. provides in part:

"* * * Excess cut material, if any, shall be disposed of by using the material for flattening the outside slopes of the pond dikes, and increasing the height of the lap dikes or as directed by the Contracting Officer. * * *

⁸ Although the Government objected to this terminology (Tr. 39, 40), we will refer to the structure as a dike since the parties used this term throughout the hearing. The Government disputing that the structure was a dike, or functioned as one, refers to it as the "unreal dike" (Closing Brief, p. 1).

⁹ Tr. 41. Mr. Antrim located the eastern portion of the dike by a red arrow and circle on Sheet No. 4 of 7, Drawing No. Y-947 (App's Exh. 2).

¹⁰ Property Corner -1 is approximately 58 feet (50 feet plus the width of the diversion ditch) from the corner of the project site which is identified as Property Corner -C. The contract required that the diversion ditch be eight feet wide at the bottom from Station 4+00 north and 12 feet wide at the bottom from Station 5+00 south (Diversion Ditch Plan & Profile, Sheet No. 11 of 16, Exh. B).

¹¹ These figures would indicate total excavation in excess of 100,000 cubic yards. However, it appears that actual excavation was substantially less since the lagoon banks sloped inward and there were benches which indicate that the entire lagoon area was not excavated to the depth indicated.

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tion for the lagoon commenced on December 13, 1967, the work was delayed by heavy rains and substantial excavation was not accomplished until the last week in December of 1967 (Tr. 193, 250). Excavated material from the lagoon was hauled into the building area for fill and grading purposes (Tr. 112, 193, 256). After the building area had been brought to approximately finished grade, appellant's construction superintendent, Mr. Edward Oldham, came to Mr. Ralph Williams, Government project inspector, and inquired where excess material from the lagoon could be placed (Tr. 112, 118, 193, 261, 262). Mr. Williams designated an area in the northwest corner of the project site along the east bank of the diversion ditch between Station 0+00 and Property Corner -1.¹² Mr. Oldham indicated that " * * * they wanted to widen the dike, on the perimeter dike, the ditching dike * * *" (Tr. 120).

¹² Tr. 120, 130, 194, 195, 261-263. Subparagraph 2G.13. of the specification provides as follows:

"Diversion Ditch and Dike: A diversion ditch and dike shall be constructed across the southern portion of the school site as shown on the drawings. The transverse section shall be as shown under Typical Section on Profile Sheet. The grading excavation, borrow, and fill compaction shall conform to the same headings under Site Grading of this Division."

The heading "Site Grading" is Section "D" under Division 2, "Site Work", of the specification and Paragraph 3 of Section D is entitled "Excavation and Borrow." Subparagraphs 2D.3.b. and c. provide as follows:

"b. Utilization of Excavated Materials. All suitable material removed from the excavations shall be used, insofar as practicable, in the formation of embankments, subgrades, slopes, and for such other purposes as directed by the Contracting Officer. No excavated material

Neither Mr. Oldham nor Mr. Williams could recall the date of this conversation which appears to have been approximately mid-January of 1968.¹³ While Mr. Antrim testified that the diversion ditch was the "first thing put in on the job" and that the ditch was completed at the time of the rains in July of 1968 (Tr. 91) the ditch was not complete at this time.

The diversion ditch (notes 10 and 12, *supra*) is not to be confused with the "diversion dike." The diversion ditch extended for approximately 500 feet parallel to the northwestern boundary of the project site and

shall be wasted without the authorization of the Contracting Officer. Material authorized to be wasted shall be disposed of as directed by the Contracting Officer, and in such manner as not to obstruct the flow characteristics of any stream or to impair the efficiency or appearance of any structure. No excavated material shall be deposited at any time in a manner that may endanger a partly finished structure by direct pressure, by overloading banks contiguous to the operations, or that may be in any other way detrimental to the completed work.

"c. Selection of Borrow Material. Borrow material shall be selected to meet the requirements and conditions for the particular embankment or backfill for which it is to be used. Borrow material shall be obtained from sources selected by the Contractor, subject to the approval of the Contracting Officer. All necessary clearing, the grubbing of borrow pits, the disposal and burning of the debris therefrom, and satisfactory drainage of the borrow pits, shall be considered as incidental operations to the borrow excavation, and shall be performed by the Contractor at no additional cost to the Government."

¹³ Tr. 131, 132, 196. Daily Construction Reports written by Mr. Williams, not all of which are in evidence, reflect that material from the lagoon was being placed at the building areas as of January 5, 1968 (Tr. 256). The first Report which indicates any other disposition of earth from the lagoons is that of January 22, 1968, which states in part: "Excavating sewerage Lagoons. Wasting excess dirt from lagoons on downstream side of Diversion Ditch Dike." [sic] (Exh. 7).

then curved to the southeast (App's Exh. 1). The total length of the diversion ditch was approximately 4,126 feet, not all of which was on the project site (App's Exh. 1). Its purpose was to intercept water from the west and south and drain it away from the site to the east and north (Tr. 171, 172). The contract required that an embankment of compacted fill four feet wide at the top having a slope of 4:1 on the side away from the ditch be placed along the downstream (eastern and northern) sides of the ditch (Diversion Ditch Plan and Profile, note 10, *supra*). The general slope of the project site was to the east (Tr. 26, 151; Existing Site Plan, Govt's Exh. A). However, to the northwest of the project site was an area of lower elevation identified as a "wash" and the break point as to whether the flow in the diversion ditch was to the north or the south was Station 0+00, which is approximately 230 feet to the south of Property Corner -1.

Mr. Williams testified that the route used by appellant's equipment in hauling earth from the lagoon to the east bank of the diversion ditch was along the north fence line (Tr. 196, 197). He stated that at this time (mid-January 1968) the diversion dike had not been constructed. He asserted that Mr. Oldham inquired as to whether it would be all right to place waste material along the north fence line.¹⁴ He

testified that after he and Mr. Oldham " * * * looked the area over and decided that it wouldn't have any effect on anything, we decided it would be all right to waste dirt in that area."¹⁵ The only condition placed upon disposal of earth along the fence was that the material not be higher than the desert vegetation which was approximately 18 to 36 inches in height (Tr. 204, 264). The dike, according to Mr. Williams, was constructed during the following week or ten days and was completed by the end of January 1968 (Tr. 205, 206, 209).

Mr. Oldham denied requesting permission to build a dike or road (Tr. 118). However, he stated "Our only request was that we wanted a place to put excess material which we had to get rid of" (Tr. 118). He admitted that he did not object to placing the material on the dike because " * * * I had to have someplace to put the material" (Tr. 135). He testified that the dike had been completed before they were requested to place material along the diversion ditch (Tr. 130, 131). We find that the testimony of Mr. Williams that the dike had not been constructed at the time appellant was placing earth excavated from the lagoon along the east bank of

wanted to just plate this area up in here to have something to run his equipment on, to stay out of that dust." (Tr. 197.)

¹⁴ He stated that the desert soil "powders up" where traveled by heavy equipment and "But in order to facilitate the moving of this dirt to a waste area up in here, he [Oldham]

¹⁵ Tr. 199. When asked on cross examination what he meant by "it wouldn't effect (sic) anything," he replied, "Well, the dike, the so-called dike along the fence at the north property line was running in the same direction that the water would run, and it wouldn't divert water from any direction as far as I could see." (Tr. 279.)

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the diversion ditch is the more credible. First, the evidence establishes that the dike was constructed during the approximate period January 21 through January 31, 1968 (Tr. 79, 80, 85, 133, 205, 206). The Daily Construction Report, dated January 22, 1968 (note 11, *supra*), indicates that earth from the lagoon was being deposited on the downstream side of the diversion ditch as of that date. Second, although Mr. Oldham acknowledged having several conversations with Mr. Williams concerning disposal of material from the lagoon, he could not recall the dates of these conversations (Tr. 118, 120, 130, 132).

Mr. Antrim testified that he first became aware that he had to build a dike which was not shown on the plans approximately January 21, 1968, when he was informed by Mr. Oldham that he was "having to spend additional costs to get rid of excess dirt." (Tr. 79.) He admitted that he did nothing at that point even though he was aware that the dike was not required by the contract. He was also aware of the fact that changes required the approval of the contracting officer.¹⁵ When asked as to what function the dike was to serve, he recalled that there

was some conversation between Mr. Williams and one of his (Antrim's) employees to the effect that the dike was to protect the site and the lagoon from drainage from the north.¹⁷ Mr. Antrim asserted that he returned to the site on January 31, 1968, and stopped the operation (the building of the dike) which was about one-half as high as the project inspector wanted it (Tr. 80, 99, 100, 104). Mr. Oldham testified that on or about January 31, 1968, he was directed by Mr. Antrim to place no more material on the dike (Tr. 119-121). In later testimony he asserted that the dike was completed as "it is now" as of January 31, 1968, although "we could have dumped another 15 or 20,000 yards on it" (Tr. 135). Mr. Williams confirmed that the road (dike) was completed as of January 31, 1968 (Tr. 210).

A Daily Construction Report, dated January 31, 1968, signed by Mr. Williams (Tr. 213; Exh. 8), contains the following:

Note: Mr. Antrim, advised that he had not figured on moving the excess dirt

¹⁵ Tr. 80. A letter from the Contracting Officer to the contractor, dated October 10, 1967 (Gov't's Exh. D) outlines the authority of the project inspector and states, *inter alia*, that the project inspector is not authorized to " * * * issue any directions which in any way affect the contract price or time, change any provision of the specifications or drawings, or waive the requirements thereof."

¹⁷ Tr. 81-83. We consider this alleged purpose of the dike to be unlikely. Although Mr. Antrim indicated that the dike would protect the site from off-site drainage to the north (Tr. 83, 89) we accept Mr. Oldham's testimony that drainage north of the dike was to the north and east (Tr. 137). It therefore appears that the dike would more readily have protected the lagoon from off-site drainage from areas to the northwest had it extended along the fence-line from Property Corner -2 to Property Corner -3 (App's Exh. 1) (shown as Property Corners -3 and -4 on Gov't Exh. A). This purpose of the dike also seems inconsistent with appellant's theory that the dike funneled water into the lagoon during the heavy rains of July 20-22, 1968.

from the Lagoons [sic] for any great distance. Since Specifications, page D-2 para. B, states that: Excess excavation material from Lagoons will be disposed of in the immediate vicinity.¹⁸

Mr Antrim and the undersigned agreed to waste the excess material, approximately 20,000 cu. yds, in the Area [sic] just South of the Lagoons and on both sides of the Lagoon Access Road. [sic] This will be an area of about 200' x 500' on both sides of the Access Road and will be about 2'-feet [sic] deep. The Area [sic] after this waste dirt has been deposited will be shaped so no interference with natural drainage in this area will occur. [sic]

Mr. Antrim denied entering into any agreement with Mr. Williams to dispose of material excavated from the lagoon in an area 200 feet by 500 feet (Tr. 70). In fact, he denied speaking to Mr. Williams on January 31, 1968 (Tr. 71, 102, 302). Mr. Oldham testified that since Mr. Antrim had indicated that he did not want to move the material any great distance, he (Oldham) talked to Mr. Williams and asked that a spot nearer to the lagoon be designated (Tr. 119, 120). Mr. Williams insisted that he spoke to Mr. Antrim on January 31, 1968, concerning the disposal of material from the lagoon (Tr. 247, 266-268, 271, 274). Since his testimony is consistent with a contemporaneous memorandum, we consider that Mr. Williams' testimony in this respect is the more credible. However, we do not think it necessary to resolve this conflicting testimony. There is no dispute that after January 31,

1968, earth excavated from the lagoon was placed on either side of the lagoon access road to the south and southwest of the lagoon (Tr. 103, 133, 275; App's Exh. 1).

Mr. Antrim admitted that the dike was used as a haul road " * * * But after this was built, we did move some of this concrete aggregate over this diversion dike, since it was there. * * *" (Tr. 49.) However, he asserted that the dike was seldom used for such purpose since " * * * our main haulroad was elsewhere." (Tr. 47.) While this latter assertion is supported by the record in that base course material (gravel) was hauled to the site from a pit in the area to the northwest (Anegam Wash) over a road to the south of the diversion dike (Tr. 48; App's Exh. 1); we note that under questioning by the hearing officer Mr. Antrim, referring to the dike, stated: " * * * In fact, I would say that it was necessary in that operation, almost, to have a good road down there." (Tr. 93.) Mr. Oldham confirmed that the dike was used as a haul road on occasion but denied that it was a necessity (Tr. 117).

Appellant contends that the contracting officer and the project inspector have misinterpreted the contract. Appellant asserts that the provision relied upon by the contracting officer (note 7, *supra*) is applicable to earthwork for utilities and not earthwork for the lagoon (Tr. 94, 95; Post Hearing Brief, p. 14 *et seq.*). Under cross-examination, Mr. Williams admitted that it was "very possible"

¹⁸ The specifications do not contain this language. Provisions relied upon are those quoted previously (note 7, *supra*).

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that he had cited the provision of the specifications giving the Government the right to direct disposal of the material at any place within one-half mile of the site (note 7, *supra*) in the conversation with Mr. Antrim on January 31, 1968 (Tr. 246, 269-272). In other testimony, he asserted that he had no knowledge of any discussion with Mr. Antrim as to which provision of the specification was controlling (Tr. 268, 275). At another point he asserted that the provision referred to could have been used as a guideline (Tr. 247).

Decision

The constructive change doctrine is composed of two elements, the change element and the order element.¹⁹ We will consider these elements in the order indicated.

The contract required that an embankment of compacted fill be placed along the downstream (easterly and northerly) side of the diversion ditch over its entire length (notes 10 and 12, *supra*). The record does not reflect whether material excavated in forming the ditch was sufficient to construct this embankment. Assuming that material excavated from the ditch was insufficient to form the embankment, the contractor clearly had an obligation to obtain sufficient borrow or other material to construct the embankment to the lines and grades shown

on the plans. While the contractor could select the sources of borrow, such sources were subject to the approval of the contracting officer (Subparagraph 2D.3.c., note 12, *supra*). We assume that the contracting officer would be required to act reasonably in exercising such approval authority.²⁰

The evidence establishes that appellant hauled earth excavated from the lagoon to points along the east bank of the diversion ditch between Station 0+00 and Property Corner -1. It is not clear whether this material was necessary to complete the required embankment along the ditch to the lines and grades shown on the plans. We conclude that appellant has not shown that this disposition of earth excavated from the lagoon constituted a change in the requirements of the contract.

There is no dispute that construction of the so-called "diversion dike" was not a requirement of the contract. There is also no dispute that appellant was obligated by the contract to excavate the floor of the lagoon to an elevation of 1,805.50 feet. The specification (note 7, *supra*) provides that excess material was to be used "* * * for flattening the outside slopes of the pond dikes and increasing the height of the lap dikes, or as directed by the Contracting Officer." (Italics supplied.) Once again we assume that the authority of the contracting officer to direct the disposition of ex-

¹⁹ *Industrial Research Associates, Inc.*, DCAB No. WB-5 (June 12, 1968), 68-1 BCA par. 7069 at 32,685-686.

²⁰ See *Meva Corporation*, IBCA-648-6-67 (August 18, 1969), 76 I.D. 205, 69-2 BCA par. 7838, footnote 80 and accompanying text.

cess material would have to be exercised reasonably. Appellant argues that the provision of the specification (Subparagraph 2C.4.c. note 7, *supra*) providing that excess material produced by grading and excavation shall be disposed of in the nearby vicinity (within $\frac{1}{2}$ mile of the site) as directed is applicable to earthwork for utilities and not earthwork for the lagoon. The difficulty with this contention is that "Earthwork for Lagoons" is Paragraph 6 under Section C of the specification which covers "Earthwork for Utilities." We conclude that the two provisions of the specifications are not so readily separable as appellant would have us believe.

We assume that the specific provision applicable to the lagoon is controlling. However, application of the rule that a specific provision will override a general provision is of little assistance here since the general provision applicable to all earthwork for utilities which defines "nearby vicinity" as within one-half mile of the site is more specific than the "as directed by the Contracting Officer" language of the provision applicable to the lagoon. We have referred to testimony of Mr. Williams to the effect that the one-half mile provision could have been used as a guideline. We consider this position to be sound since it is well settled that a contract must be interpreted as a whole²¹ and the one-half mile pro-

vision would certainly be for consideration in determining whether the contracting officer acted reasonably in directing the disposition of excess earth from the lagoon. No part of the diversion dike was in excess of one-half mile from the lagoon and obviously was not in excess of one-half mile from the site. We conclude that although construction of the diversion dike was not a requirement of the contract, the contract expressly authorized the contracting officer to direct the disposition of excess earth excavated from the lagoon and that appellant has not shown that this authority was exercised unreasonably. It follows that appellant has not shown that construction of the dike constituted a change in the requirements of the contract.

Assuming, *arguendo*, that work above and beyond the requirements of the contract was accomplished, we turn to the question of whether the evidence supports the conclusion that this work was accomplished by an order emanating from one authorized to bind the Government. We find that the designation by Mr. Williams of the east bank of the diversion ditch in the northwest corner of the project site for the disposition of excess material from the lagoon would constitute such an order provided he had authority to issue it or the lack of authority was otherwise cured. The evidence as to whether an order was issued to build the diversion dike is in conflict. Mr. Williams testified that Mr. Oldham asked permission to deposit the ex-

²¹ *Hol-Gar Manufacturing Corp. v. United States*, 169 Ct. Cl. 384 (1965).

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cess material along the north fence line in order to facilitate hauling the material to the east bank of the diversion ditch. Mr. Oldham denied requesting authority to build a road or dike, but admitted asking for areas to be designated in which to deposit the excess material. Contrary to the testimony of Mr. Oldham, we have found that the diversion dike was not completed at the time the contractor was directed to place excess material excavated from the lagoon along the east bank of the diversion ditch. We consider Mr. Williams' testimony to be the more probable in that it would be logical for the contractor to have requested permission to place material along the north fence line as an aid to hauling material to the embankment. However, for reasons hereinafter stated acceptance of the contractor's version of how the dike came to be built would not alter the result.

It is, of course, fundamental that to commit the Government, the order must have been issued by or with the approval of one having authority to do so.²² The letter from the contracting officer to appellant, dated October 10, 1967, outlined the authority of the project inspector and clearly placed the contractor on notice that this official did not have authority to make changes to the contract. Mr. Antrim admitted that he was aware of the fact changes required the approval of the con-

tracting officer. Appellant attempts to overcome this deficiency in its proof by alleging that the contracting officer was aware that extra work was being required²³ and citing decisions holding that work not required by the contract which was accomplished at the direction or instigation of subordinate officials with the knowledge or acquiescence of the contracting officer or his authorized representative constituted a constructive change.²⁴ We are fully in accord with the cited principle and have applied it where the facts warranted.²⁵

The contention that the contracting officer was aware that extra work was being performed is based primarily on the Daily Construction Report of January 22, 1968, which states material excavated from the lagoon was being placed along the east bank of the diversion ditch.²⁶ For reasons previously stated, this did not constitute notice that work beyond the requirements of the contract was being performed. However, even if it did

²² Post Hearing Brief, pp. 11-14.

²⁴ Among others, *W. Southard Jones, Inc.*, ASBCA No. 6321 (October 20, 1961), 61-2 BCA par. 3182.

²⁵ *Orndorff Construction Company, Inc.*, IBCA-372 (October 25, 1967), 74 I.D. 305, 67-2 BCA par. 6665 at 30,924. *Cf. Franklin W. Peters and Associates*, IBCA-762-1-69 (December 28, 1970), 77 I.D. 213, 71-1 BCA par. 8615 at 40,029.

²⁶ Appellant also relies on the Daily Construction Report, dated January 31, 1968, the pertinent portion of which is quoted in the text. Since even under appellant's version of the evidence, work on the dike was stopped on January 31, 1968, it is difficult to comprehend how this report could constitute notice that extra work was being performed.

²³ See *F. H. Antrim Construction Co., Inc.* (note 1, *supra*), and cases cited.

constitute such notice, the principle appellant seeks to apply is not applicable under the circumstances present here. The record reflects that the diversion dike was constructed during the last week or ten days of January 1968. Mr. Antrim first learned of the alleged requirement for the dike on or about January 21, 1968. He did nothing even though he was aware of the fact that changes required the contracting officer's approval. Mr. Oldham did not protest the requirement to build the dike because he stated that he had to have some place to put the material. We have held that a contractor's failure to follow known and established procedures for seeking review of a subordinate's decision or actions allegedly requiring the performance of extra work which failure precludes the Government from exercising options which may have the effect of avoiding the costs claimed is a sufficient basis for denial of the claim.²⁷ We conclude that the cited principle is applicable here.

For the reasons set forth above, we hold that appellant has failed to establish that work above and beyond the requirements of the contract was performed and that even if work not required by the contract was performed, appellant has failed to establish that it was ordered or approved by anyone having authority to commit the Government. In addition, appellant has failed to

show any reason for failing to protest to the contracting officer what it now alleges to be a requirement for extra work imposed by the project inspector. It follows that the extra dike claim must be and hereby is denied.

Lagoon Damage

Appellant alleges that as a result and consequence of the dike constructed at the order of the Government, floodwaters were channeled into the lagoon necessitating substantial expenditures for the removal of mud and in reshaping and compacting the lagoon dikes (Complaint, pars. 11 and 12). Although the dike was not a requirement of the contract, excavation of the lagoon and disposition of excess material in a manner directed by the contracting officer were contract requirements. We have denied the extra dike claim for the reason, among others, that appellant had not shown that work beyond the requirements of the contract had been accomplished or if accomplished, that such work was ordered or approved by anyone having authority to bind the Government. Nevertheless, we will review the evidence to ascertain the factual basis for this claim.

The record reflects that an inch of rain fell on the project site on July 20, 1968, and that an additional one inch fell on July 22, 1968 (Tr. 124; Daily Construction Reports, dated July 20 and 22, 1968, Exhs. 16 and 17). Mr. Williams testified that the rain on July 20 fell

²⁷ *John H. Moon & Sons, IBCA-815-12-69* (July 31, 1972), 79 I.D. 465, 72-2 BCA par. 9601.

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in 30 or 40 minutes.²⁸ The Daily Construction Report for July 22, 1968 (Exh. 17), contains the following: "Approximately one (1) inch of rain fell late today and considerable damage was done to base course in the streets."

Mr. Oldham testified that he was in the fire station (Building I-4) at the time of the rain on July 20 and that he could see water flowing along the south side of the diversion dike and into the lagoon (Tr. 124, 125, 136). He stated that water was going over the dikes around the lagoon. The water caused damage to the lagoon which had to be repaired before the work could be accepted (Tr. 126; photos, Exh. 20).

The fire station is approximately 700 feet from the eastern terminus of the diversion dike (Tr. 136; App's Exh. 1). Mr. Williams testified that he was in the fire station with Mr. Oldham at the time of the rain of July 20, 1968 (Tr. 234). He stated that the desert vegetation and the heavy rain obscured the view, that he could not see the diversion dike from the fire station and that he did not think it possible for anyone else to do so (Tr. 236-239).

The evidence is in conflict as to the extent of site grading which had been completed at the time of these rains. A memorandum, dated August 7, 1968 (Exh. 18), written by Mr. Williams states that "sur-

face flood water ran into the lagoons" and contains the following:

If the site grading was even roughed out per site grading plans very little or no water could enter the streets and no water could enter the lagoons. The damage incurred in streets and lagoons could have been avoided if the grading had been completed.

Since the Daily Construction Report of July 22, 1968, quoted above, states that the rain damaged the base course, we have considerable doubts as to the accuracy of this memorandum insofar as it implies that damage to streets was caused by failure to complete the grading. Mr. Antrim testified that the site grading was done, the curb and gutter was in and most of the base course was down at the time of the rains in July of 1968 (Tr. 69). He asserted that the dikes or benches around Cell No. 1 of the lagoon were constructed according to plan and denied that flooding of the lagoon was caused by failure to complete the work (Tr. 70, 71). At the hearing, Mr. Williams testified that site grading in the immediate vicinity of the lagoon had not been completed as of July 20, 1968 (Tr. 223).

We do not consider it necessary to resolve any controversy as to the extent of completion of site grading on the project as a whole, since it is undisputed that the sewer trench was open from Manhole No. L-1 northward for a distance of approximately 375 feet (Tr. 223-225; App's Exh. 2). Manhole No. L-1 is located approximately 100 feet south of the southernmost portion of the

²⁸ Tr. 235. In this respect, he may have confused the rain of July 22, 1968. Writing on the reverse of a photo taken by Mr. Williams on July 22, 1968 (Exh. 19) states that approximately one inch of rain fell today in about 40 minutes.

lagoon. Since the trench had not been closed, it is obvious that grading around the lagoon had not been completed.

Mr. Oldham observed water flowing through the trench and into the lagoon at the time of the rains (Tr. 143). Mr. Antrim admitted that the open sewer trench was a contributing factor to floodwaters entering the lagoon (Tr. 92, 105, 106). He asserted that water came over the top of the lagoon dikes (Tr. 88, 105, 106, 303). However, he was not at the site at the time of the rains and acknowledged that his contention the diversion dike channeled water into the lagoons was based on his own logic (Tr. 90). When asked how long the trench had been open, Mr. Antrim replied that it had been open for some time. He stated that this had been the subject of a dispute with the plumbing contractor.²⁹

Mr. Williams testified that the sewer trench had been open for several weeks at the time of the rains (Tr. 240). However, he indicated that the water level in the cells of the lagoon did not exceed three feet and stated that water coming into the lagoon through the

trench could not have damaged the lagoon above the trench line (Tr. 286, 287). The bulk of the damage was above the water line in the lagoon (Tr. 294). He asserted that surface waters which ran into the lagoon came from off of the site to the west (see note 17, *supra*) and that erosion damage to the lagoon was principally along the west bank (Tr. 288). Photos taken on July 22 and August 7, 1968, confirm that erosion damage to the lagoon occurred along the west bank (Exhs. 19 & 20). The Board finds that erosion damage to the lagoon was caused principally by water which overflowed the lagoon dikes.³⁰ However, we accept Mr. Antrim's admissions at the hearing and in the claim letter that the open sewer trench was a contributing factor to lagoon damage. We note that the lagoon damage claim is based in part upon removal of earth washed into the lagoon and there can be no doubt that the open sewer trench was a substantial factor in conducting material into the lagoon (Tr. 296).

Remaining for consideration is whether appellant has established its contention that the diversion dike had the effect of channeling water into the lagoon. The evidence on this issue is confused and contradictory. As noted previously, the

²⁹ Tr. 106. The claim letter of November 17, 1970 (note 4, *supra*) states in part:

"I told Arguelles [Bureau engineer] at the time that it was caused either by the dike or by the open sewer trench. Arguelles apparently discussed this with Williams who took pictures and documented the episode so as to keep himself blameless.

"Since the sewer trench had been open an unnecessarily long time, I thought I had an action against the sewer contractor. * * * The letter states that the litigation was resolved in favor of the sewer contractor because of the testimony of Mr. Williams.

³⁰ Appellant introduced photos taken in April of 1970 (App's Exhs. 7, 8 and 9), for the purpose of showing that erosion along the west banks of the lagoon had occurred since the job was completed and rebutting the contention that failure to complete the work caused the damage. We note that the weather conditions since the work was completed are not shown.

April 20, 1973

lagoon was to the northeast of the buildings and the general slope of the site was to the east. Mr. Walter Parks, a Bureau engineer, testifying with reference to contour lines on the Existing Site Plan (Govt's Exh. A), stated the water would flow perpendicular to the contours and that where the contour bends away from dike, the water would flow away from the dike (Tr. 169). He asserted that the water would not be any deeper against the dike than it would be at points south of the dike. He was of the opinion that the flow would be parallel and away from the dike and would not affect the flow of water along the south side of the dike (Tr. 167, 170). This is consistent with Mr. Williams' opinion (note 15, *supra*).

We have previously referred to the fact that the break point where water flow to the north in the diversion ditch was at Station 0+00 which was about 230 feet to the south of Property Corner -1. The Existing Site Plan would appear to indicate that the northwest corner (Property Corner -C) was the highest elevation on the site. However, Mr. Parks testified that it (Station 0+00) was a high point and conceded that some water drained to the north beyond the boundary fence (Tr. 172). Although this may have affected a small portion of the total site, there would appear to be no room for doubt that the diversion dike would intercept some of such waters and channel them to the southeast. We

have accepted Mr. Oldham's testimony that the off-site drainage to the north of the dike was to the north and east (note 17, *supra*). The break point as to where water flowed to the east in this area is not shown. The difficulty we have with Mr. Parks' testimony is that the slope of the site was to the east and the dike extended in a southeasterly direction. We conclude that in addition to the water referred to above which would otherwise have drained to the north, the dike did have the effect of channeling water, which would otherwise have flowed off of the site beyond the north fence line to the east, in a southeasterly direction. Assuming that the diversion ditch served its intended purpose and there is no evidence that it did not, this water would be limited to that which fell on the site to the north and east of the ditch (Tr. 108). After reaching the eastern terminus of the dike, the natural flow of the water would be to the northeast along the west bank of the lagoon.

It would, of course, appear to be clear that some water would have flowed off of the site and against the lagoon banks in the absence of the dike. This is consistent with Mr. Williams' testimony that water which overflowed the lagoon banks came from off of the site to the west. We find that the dike was to the southwest of the lagoon and could not have channeled floodwaters directly into the lagoon. We further find that although the dike did have a channeling and concentrating ef-

fect as to on-site surface waters from the south and west, the dike has not been shown to be a major factor in the concentration of water in the lagoon area and resulting damage to the lagoon. There is evidence, which we accept as accurate, that water was channeled into the lagoon by the lagoon access road.³¹

Article 12 of the General Provisions (Permits and Responsibilities) provides in part that the contractor shall be responsible for all materials delivered and work performed until completion and acceptance of the entire construction work.

Decision

The evidence establishes and appellant has admitted that the open sewer trench was a factor in channeling floodwater into the lagoon. Whatever may be the responsibility for the open sewer trench as between appellant and its subcontractor, it is clear that as between appellant and the Government the open trench was appellant's responsibility.

While we have found that the dike had a concentrating and channeling effect as to on-site surface waters, the evidence does not estab-

lish that the dike was a major factor in the flood damage to the lagoon. Even if our finding in this respect had been otherwise, appellant has not shown that construction of the dike was ordered or approved by anyone having authority to commit the Government. It follows that appellant has not established that construction of the dike was the responsibility of the Government.

It is well settled that a contractor seeking to shift to the Government the risk of loss placed upon it by the Permits and Responsibilities clause must prove by a preponderance of the evidence that the loss was attributable to fault of the Government.³² The most that could be said here is that the dike had some indeterminate effect in concentrating floodwaters in the lagoon area. Appellant has failed to demonstrate that damage to the lagoon was attributable to fault of the Government.

Conclusion:

The appeal is denied in its entirety.

SPENCER T. NISSEN, *Member.*

I CONCUR:

WILLIAM F. MCGRAW, *Chairman.*

³¹ Mr. Williams testified " * * * this access road had been build up and this water hit this and followed the line of least resistance right down this and into the open sewer trench and into the lagoons." (Tr. 235.) Our only reservation as to this testimony is that since we have found that water overflowed the lagoon banks, it is likely that the sewer trench was inadequate to handle the flow. Mr. Williams testified that " * * * this trench filled with water and overspilled and here's where the bulk of the damage was done, here." (Tr. 296.)

ESTATE OF NEOLA AGNES GARDNER, LION SHOWS

2 IBIA 16

Decided April 26, 1973

³² *Steenberg Construction Company, IBCA No. 520-10-65 (May 8, 1972), 79 I.D. 158, 72-1 BCA par. 9459, at 44,027.*

April 26, 1973

Appeal from Judge's denial of appellant's petition for rehearing.

Affirmed.

105.1 Indian Probate: Administrative Procedure: Applicability to Indian Probate

Judge must conform to the requirements of the Administrative Procedure Act, 5 U.S.C. § 554 (1970) and give adequate notice and afford interested party opportunity to be heard.

165.10 Indian Probate: Claims Against Estate: Proof of Claim

When an objection is made to, and evidence is submitted challenging the validity of, a creditor's claim, the creditor must be present at the hearing and the burden is on the creditor to prove his claim.

370.0 Indian Probate: Rehearing: Generally

A petition for rehearing, based upon evidence which fails effectively to controvert the basis of the initial decision in the matter, will be disallowed.

APPEARANCES: Bert W. Kronmiller, Esquire, for Appellant.

OPINION BY MR. SABAGH INTERIOR BOARD OF INDIAN APPEALS

This matter comes before the Board on appeal from the Administrative Law Judge's denial of appellant's petition for rehearing of his claim against the estate of the decedent.

Neola Agnes Gardner, Lion Shows died intestate on April 29, 1971, at the age of 56 years. Appellant filed a creditor's claim on

May 28, 1971, in the amount of \$3,866.65 accompanied by a promissory note and a statement of account. The proof of claim, among other things, states that:

George T. Cooley doing business at the town or city of Lodge Grass, Montana, as George's Food Mart * * * has charge of the books and accounts of the said claimant and knows the attached itemized statement of account is a true and correct statement of the account of the claimant for merchandise or services sold or rendered to the decedent and shows all charges and credits and the dates, thereof; that the prices charged were the fair and reasonable prices therefore at that time; that after allowing all credits and set-offs, there is still due and owing to the claimant a balance of \$3,866.65, now past due and owing from the decedent to the claimant.

No itemized statement of account of the claimant for merchandise or services sold or rendered to the decedent was included with the claim.

The promissory note in the sum of \$2,775.10 and payable to George T. Cooley with interest at 8 percent per annum was co-signed by the decedent and her husband, James Lion Shows. The statement of account includes the principal amount of the note, \$2,775.10, with interest to May 26, 1971, of \$1,091.55, aggregate amount of \$3,866.65.

Notice of Hearing to Determine Heirs or Probate Will and Notice to Creditors was mailed to all interested parties on October 15, 1971, and Notice was posted at the Post Office, Lodge Grass, Montana, on the same date.

Appellant failed to appear at the hearing. The hearing was held pursuant to the notice on November 9, 1971, at which time objection was made to appellant's claim and testimony taken in substantiation of the objection. The defense against the claim raised at the hearing was that security had been given and had been foreclosed without proper credit; that the note was paid. The Judge issued a decision and order dated January 12, 1972, wherein he denied appellant's claim based on the promissory note. On March 8, 1972, appellant petitioned for rehearing for the following reasons:

1. The claim was for groceries, meat, and other food and supplies furnished by the petitioner and not for money loaned in exchange for certain artifacts pawned with petitioner as testified to at the hearing.

2. The artifacts were pawned with the petitioner for more than three years and had no exceptional value as manifested at the hearing.

3. Testimony at the hearing failed to allude to the true nature of the claim, *i.e.*, for groceries and supplies furnished the decedent.

The Judge issued an order on March 22, 1972, disallowing the petition for rehearing, wherein he found that:

* * * the petitioner failed to sustain the burden of proving his claim and that no valid reason for the failure to appear at the hearing has been presented.

The appellant filed an appeal on May 18, 1972. Several grounds were offered in support thereof, which are substantially as follows:

1. Creditor claim was presented and properly filed which was denied for the failure of the appellant to personally appear and defend same at the original hearing.

2. Evidence exists in the form of oral testimony and written documents to verify the claim.

3. Failure to appear was due to appellant's unawareness of any objections to his claim.

4. Appellant's business necessitated his continuous presence during working hours.

5. He was never required to be present to present similar such claims in 20 years as a businessman.

6. Hearing Examiner by his order denying the petition for rehearing has denied him an opportunity of presenting new facts, evidence and information in the form of oral testimony relative to the claim.

Let us now turn to the question of whether the Judge erred in disallowing appellant's petition for rehearing.

Pursuant to long-established principles of law, the Judge after proper notice was required to afford a party in interest an opportunity to be heard. 5 U.S.C. § 554 (1970).

The appellant was properly notified that his claim would be considered at a hearing to be held on November 9, 1971, at 2 p.m., and the Notice admonished him to be present in these words:

All persons having an interest in the estate of the above-named decedent, and all creditors having claims against said estate, are hereby notified to be present at the hearing and furnish such evidence as they desire. (*Italics supplied.*)

April 26, 1973

A rehearing will be granted where the original hearing did not conform with the standards of a full opportunity to be heard embodied in the Administrative Procedure Act, but not otherwise. *Estate of Little Toby (Tobin)*, A-24519 (February 14, 1947).

Appellant states in his appeal that he was not present at the initial hearing because he was not aware of any objections to his claim against the decedent's estate; that his business necessitated his continuous presence; and that in 20 years as a businessman filing similar such claims he had never been required to be present to present a creditor's claim.

It may be said that the submission of the Proof of Claim establishes a prima facie right to recover which, in the absence of objections, would afford a basis for allowance of the claim. However, claimant had the burden of proof as to the claim and the person objecting thereto need only rebut the prima facie case made, not disprove the case entirely. *Controller v. Lockwood*, 193 F.2d 169 (9th Cir. 1951); *In re A & G Knitting Mills*, 144 F.2d 125 (3d Cir. 1944); *In re George R. Burrows, Inc.*, 156 F.2d 640 (2d Cir. 1946); *In re Varney*, 22 F.2d 230 (6th Cir. 1927).

Where an interested party rebuts the prima facie case made by the claimant, the Department has consistently held that:

*** [A] duly filed proof of claim against the estate of a deceased Indian

may establish a *prima facie* right to recovery in the claimant, but where the only evidence thereafter submitted to the Examiner in regard to the claim directly challenges the claim's validity, claimant must then go forward with evidence to discharge his burden of proving the claim and unless such burden is sustained the claim cannot be allowed. (Italics supplied.) *Estate of Louise Sanderville Berrychild Croft*, IA-1288, May 16, 1966.

The appellant maintains in his appeal that the order denying his petition for rehearing was erroneously issued though the petition alleged that new facts, evidence and information in the form of oral testimony and written documents would be presented. The nature of the written documents or the oral testimony was not disclosed. However, the original petition for rehearing referred to "original tickets or invoices * * * in the possession of your Petitioner * * *."

New evidence is evidence that was not available to the appellant at the time of the hearing (November 9, 1971) and subsequent thereto became available. Obviously this is not the case here. The evidence and information that he now wishes to submit were peculiarly within the knowledge of the appellant at the time of the hearing and could have been presented had he been present at the hearing. It is not new.

We cannot agree with the appellant and conclude that the Judge did not err in denying the petition for rehearing.

To recapitulate, the appellant was properly notified and afforded an opportunity to be heard. He chose

not to. Objection was made and evidence was submitted concerning the validity of appellant's claim. The appellant was not present to defend his claim. In other words, the appellant sat on his rights. He sat silent and took the chance of a favorable decision on the record made. He should not now be permitted to reopen the case for the introduction of evidence long available and susceptible of production at the original hearing.

We find no merit to any of the contentions raised against the deci-

sion and order of the Judge denying the petition for rehearing.

NOW THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is DISMISSED, and the order of January 12, 1972, denying the claim of George T. Cooley stands unchanged. This decision is final for the Department.

MITCHELL J. SABAGH, *Member.*

I CONCUR:

DAVID J. MCKEE, *Chairman.*

APPEAL OF IVERSON CONSTRUCTION COMPANY (A/K/A ICONCO)

**INTERIOR BOARD OF
CONTRACT APPEALS**

IBCA-981-1-73

ORDER

Decided *May 1, 1973*

Contract No. 14-06-D-7193, Specifications No. DC-6898, Tower Footings for Upgrading, Section of Malin-Round Mountain 500-kv Transmission Line, Pacific Northwest-Pacific Southwest Intertie, Bureau of Reclamation.

Denied Without Prejudice.

Rules of Practice: Appeals: Generally—Rules of Practice: Evidence—Rules of Practice: Witnesses

A contractor's application to take depositions of retired Bureau employees and of a newspaper reporter will be denied, since such prospective witnesses are not under the control of the Government and the Board has no jurisdiction over third parties.

Rules of Practice: Appeals: Generally—Rules of Practice: Evidence—Rules of Practice: Witnesses

A contractor who fails to take advantage of Government offers to examine certain information relative to its claims is not entitled to have its application to take the depositions of Government employees for purposes of discovery granted, as the contractor has not shown good cause as required by the Board's rule governing discovery (43 CFR 4.115).

APPEARANCES: Wade H. Hover, Attorney at Law, San Jose, California, for the appellant; William A. Perry, Department Counsel, Denver, Colorado, for the Government.

This appeal stems from a contract for the upgrading of a section of transmission line at an estimated price of \$258,700, and consists of two claims. The first claim, in the amount of \$80,304.95, arose out of an alleged acceleration in performance ordered by the Government. The second claim is in the sum of \$8,476 and is for additional concrete required.

The appellant has made an application under Sec. 4.115 of the Board's rules to take oral depositions of William C. Hart, John R. Merlino, John Chiolero, Donald Hildebrandt, and William Boyett (or "Bouett"), who are allegedly employed by the Bureau of Reclamation, and of Dennis Smith, who is identified as an employee of a newspaper in Burney, California. As specified in the application, the deposition of Mr. Smith, if allowed, is intended for use as evidence and the purpose of the other depositions is discovery.

In its application, appellant asserts that Messrs. Hart, Merlino, Chiolero, Hildebrandt and Boyett are Bureau employees and inspectors who had control and authority to issue orders on the job and that each actively participated in giving such orders. They are said to have "personal knowledge of the progress of the work and orders of supervisors, etc."

The appellant also alleges that "these persons were all identified in Government records and their acts and conduct are well known to the Government but not to" the contractor. Appellant states that they have been interviewed by the Government but not by it. Appellant believes that "some or all * * * have made written and oral statements which" it "believes will be helpful to proof of its case."

Finally, the belief is expressed by the appellant that the passage of time is prejudicial to its case, that details may be forgotten, that "some are retired, and that as time passes others may become unavailable." It is said that if they are produced for oral depositions, the "costs of transporting [the] witnesses at [the] time of hearing will be cut considerably."

Appellant seeks to take Mr. Smith's deposition in the belief that he has "research data available that will further prove" its appeal which it "needs * * * for the fair and proper presentation of its case * * *."

The Government opposes the application for several reasons. First, it contends that there has been no showing of good cause made as required by Sec. 4.115 of the Board's rules. Second, the motion is said to be premature in that the Government intended to cooperate in discovery proceedings without a formal request to the Board. According to Department Counsel, the Government first anticipated exchanging all unprivileged documents with the appellant, which has

not occurred. In the Government's view the extent, if any, of examination by deposition cannot be determined in advance of inspection of the documents. Finally, the Government objects to the application on the ground that the appellant has failed to specify with particularity the scope of the respective examinations to be conducted.

For the reasons hereinafter set forth, the application in its entirety is denied without prejudice to renewal. Messrs. Chiolero and Boyett are retired and no longer employed by the Bureau of Reclamation, according to Department Counsel. Mr. Smith has not been employed by the Bureau. As such they are third parties over whom the Board has no jurisdiction.¹ In the absence of a showing that the Government has control over Messrs. Chiolero, Boyett, or Smith, the application as to them is denied *ipso facto*.²

For other reasons, the application is denied as to Messrs. Hart, Merlino and Hildebrandt. In the first place, as we recently observed, the granting of applications to take depositions is discretionary with the Board.³ Even if good cause is

¹ *Blackhawk Heating & Plumbing Co., Inc., & Donovan Construction Company*, VACAB No. 744 (September 23, 1968), 68-2 BCA par. 7252; *Unicon Management Corporation*, VACAB Nos. 470 and 515 (August 12, 1968), 68-2 BCA par. 7180.

² *Id.* In addition, Mr. Smith's relationship to this case appears remote at best. But even if it can be shown that his testimony has relevance, an application for the taking of a deposition for use as evidence will not ordinarily be permitted unless the deponent will be unavailable for the hearing. *Carl W. Olson & Sons Co.*, IBCA-930-9-71 (April 18, 1973), 73-1 BCA par. —.

³ *Carl W. Olson & Sons*, note 2, *supra*.

shown, as required under Sec. 4.115, a deposition will not be authorized should it appear that the appeal will not be expedited thereby.⁴

It has been said that the term "good cause shown" in a rule regulating discovery is flexible and has no fixed or definite meaning; each application thereunder is to be evaluated upon the circumstances appearing from the pleadings and then determined by the sound discretion of the adjudicatory body before whom it is made.⁵

Here the complaint is stated in broad, general terms. The claims do not appear unusual in complexity or magnitude. The appellant has not particularized in its application the nature of the inquiries it intends to make. The purpose to be served by the taking of the depositions is by no means clear. The Government, on the other hand, has offered to make available to the appellant all unprivileged documents relating to the appeal. Under the circumstances it does not appear that the

application is necessary or appropriate at this stage.

Parties should avail themselves of the opportunities open to them through a voluntary exchange of information. Before coming to the Board for formal relief, all such informal avenues should be exhausted.⁶ In this case the appellant has not demonstrated that the information it seeks to elicit is not available to it through less costly and burdensome means than the taking of oral depositions.

We hold that the appellant has not shown good cause entitling it to the examinations requested. The application is accordingly denied without prejudice to renewal upon a demonstration of good cause therefor.

SHERMAN P. KIMBALL, *Member*.

I CONCUR:

WILLIAM F. MCGRAW, *Chairman*.

E. L. CORD, DONALD E. WHEELER,
EDWARD D. NEUHOFF

10 IBLA 363

Decided May 9, 1973

Appeals from separate Bureau of Land Management decisions (ES 4532-4536, 6801, 4529) rejecting applications for cash redemption of forest lieu selection rights.

⁶ See *Westinghouse Electric Corporation*, AEC BCA No. 68-2-70 (April 1, 1970), 70-1 BCA par. 8214.

⁴ *Id. Of. National Construction Company*, VACAB No. 775 (January 24, 1969), 69-1 BCA par. 7475, in which the Board held: "Where a discovery motion or application does not assert or show good cause for the discovery, and the record as it stands at the time of consideration of the motion or application does not either disclose such good cause, or that an order upon the opposing party to produce the information or documents sought would serve the general purposes of pre-trial discovery procedures to limit the issues to be tried, to lead to stipulation as to matters of fact, to preclude surprise at the hearing, or otherwise contribute to a just and equitable disposition of the appeal without undue delay, the Board will not issue such an order."

⁵ *Tholander v. Tholander*, 111 A.2d 643, 644 (N. J. Super. 1955).

Affirmed.

Railroad Grant Lands—Scrip: Generally

A release filed by a land-grant railroad pursuant to section 321(b) of the Transportation Act of 1940, 54 Stat. 954, extinguishes the right of the railroad or its attorneys-in-fact to select lands or receive compensation in lieu of lands originally acquired by it under the Act of July 27, 1866, in aid of construction of the railroad but relinquished under the Act of June 4, 1897.

Scrip: Payment in Satisfaction

Where a railroad's forest lieu selection rights are extinguished by a release given to the United States, the rights (if any) of a purchaser of the selection rights from the railroad are also extinguished.

APPEARANCES: Edward D. Neuhoﬀ, Esq., pro se and for E. L. Cord; Thomas Trimble, Esq., of Jennings, Strouss & Salmon, for Donald E. Wheeler.

OPINION BY MR. RITVO INTERIOR BOARD OF LAND APPEALS

E. L. Cord, Donald E. Wheeler, and Edward D. Neuhoﬀ seek review of separate Bureau of Land Management decisions rejecting their respective applications for cash redemptions of certain forest lieu selection rights made pursuant to the Act of August 31, 1964, 43 U.S.C. § 274 (1970), and the pertinent regulation 43 CFR 2012.1 *et*

*seq.*¹ Each decision recited that the alleged rights derived through the Santa Fe Pacific Railway Company (hereafter Santa Fe), had been released and relinquished by Santa Fe and were not valid. The gravamen of the several appeals is substantially similar. The appellants deny that their rights were extinguished by the release. They assert that they hold valid subsisting scrip and that they are entitled to satisfaction as provided by the Act of August 31, 1964, *supra*. The appeals, therefore, are consolidated for the purposes of this decision.

Appellants' scrip stems from the interaction of several statutes granting lands or lieu rights to Santa Fe. Certain lands were patented to the railroad under the grant made by the Act of July 27, 1866, 14 Stat. 292. They were reconveyed by the railroad to the United States pursuant to the Forest Exchange Act of June 4, 1897, 30 Stat. 36, as

¹ The names of the applicants, their application numbers, the date of the Bureau of Land Management decision and the appeal numbers are as follows:

E. L. Cord:		
ES 4532	October 16, 1970.	IBLA 71-92.
ES 4533	do	IBLA 71-92.
ES 4534	December 14, 1970.	IBLA 71-150.
ES 4534	May 26, 1971	IBLA 71-318.
ES 4536	January 8, 1971.	IBLA 71-165.
Donald E. Wheeler:		
ES 6801	December 1, 1970.	IBLA 71-134.
Edward D. Neuhoﬀ:		
ES 4529	November 2, 1972.	ILBA 73-198.

amended, by the Act of June 6, 1900, 31 Stat. 614. These Acts provided for selection rights to public land by a patentee or a settler or owner of an unperfected bona fide claim of land included within the limits of a public forest reserve upon his relinquishing his claim or title to the tract to the United States. Although the 1897 and 1900 Acts were repealed by the Act of March 3, 1905, 33 Stat. 1264, provision was made for the continuing recognition of certain selection rights under the earlier Acts. Santa Fe sold its selection rights in the early years of this century. Since exchange selection rights were held to be personal and nonassignable, see *George L. Ramsey*, 58 I.D. 272 (1942), Santa Fe adopted a procedure utilizing two powers of attorney. The first appointed an attorney-in-fact to make a selection in the name of the railroad while the second authorized him to convey the selected lands to whomever he chose. This procedure has been noted. *Battle Mountain Company*, A-29146 (January 31, 1963), *aff'd Udall v. Battle Mountain*, 385 F. 2d 90 (9th Cir. 1967), *cert. denied*, 390 U.S. 957 (1968). The appellants hold separate appointments from Santa Fe as attorneys-in-fact through mesne conveyances.

The appellants recorded their selection right documents pursuant to the Scrip Recordation Act of 1955, 69 Stat. 534, noted at 43 U.S.C. § 274 (1970), and the pertinent reg-

ulations, 43 CFR Subparts 2610, 2611. Proceeding under the Act of August 31, 1964, *supra*, which authorizes any person who recorded his claim properly to elect to receive cash instead of land, the appellants chose to receive cash. The value of forest lieu selection rights is \$275 an acre, 43 CFR 2221.2-3 (1970).²

As noted above, the Bureau's decisions held that the railroad, and, consequently, the claimants, lost all selection rights against the United States when the railroad executed a release of certain rights to railroad grant lands and indemnity rights pursuant to section 321(b) of the Transportation Act of 1940, *supra*.

The Bureau relied upon several cases to support its conclusion. The first, *Udall v. Battle Mountain*, *supra*, held that forest lieu rights were not assignable, at least prior to the Acts of July 6, 1960, 74 Stat. 334, and of August 3, 1964, *supra*, and when the United States reconveyed to the railroad the land upon which the forest lieu rights were based, as it had in that case, the selection right was extinguished. Consequently, the United States did not have to recognize any rights in the assignee even though he had recorded his rights under the 1955 Act, *supra*, prior to the reconvey-

² Under the Act of August 31, 1964, as amended, the right to apply for land or cash expired on January 1, 1970, except for soldiers' additional claims, for which filing may be made to and including December 31, 1974. 43 CFR 2612.4 (1972). Appellants filed their applications prior to January 1, 1970.

ance.² It then concluded that in another case, *United States v. Santa Fe Railroad and Donald E. Wheeler*, Civil No. 64-1430 (C. D. Cal. filed December 16, 1968) (hereafter *Wheeler*), the court held that the railroad's release had wiped out the selection rights of its assignees.

The appellants assert that *Battle Mountain* is not controlling because there the United States reconveyed the base lands to the railroad whereas here it still retains them. Further they contend that *Wheeler*, while recognizing the holding in *Battle Mountain*, held only that a patent issued to the assignee rather than the railroad in violation of the Department's regulations will be canceled. It did not, they say, rule on the effect of the railroad release vis-a-vis forest lieu rights.

Neither *Battle Mountain* nor *Wheeler* reaches the issue upon which these appeals hinge. Nevertheless, the Bureau's conclusion that the release put an end to the forest lieu selection rights of Santa Fe or its attorneys-in-fact is correct.

To see why, we turn to section 321, Part II, Title III of the Transportation Act of 1940, 49 U.S.C. § 65 (1970). Section 321(a) made concessions to the railroads which authorized increased rates and other transportation charges to the United States. To qualify for the new rates, sec. 321(b) required a

railroad to execute a release of any claim it might have " * * * against the United States to lands, interests in lands, compensation, or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier or any * * * predecessor in interest under any grant to such carrier or such predecessor in interest." It further provided that "Nothing in this section shall be construed as requiring any such carrier to reconvey to the United States lands which have been heretofore patented or certified to it."

On December 18, 1940, Santa Fe filed a release which provided that it:

" * * * relinquishes, remises and quit-claims to the United States of America and all claims of whatever description to lands, interests therein, compensation or reimbursement therefor on account of lands or interests granted, claimed to have been granted, or claimed should have been granted by any act of the Congress to Santa Fe Pacific Railroad Company or to any predecessor in interest in aid of the construction of any portion of its railroad.

The release stated that it did not embrace

" * * * lands sold by the company to innocent purchasers for value prior to September 18, 1940, lands embraced in selections made by the company and approved by the Secretary of the Interior prior to September 18, 1940, or lands which have been patented or certified to the company or any predecessor in interest in aid of the construction of its railroad."

The scope of the release was considered in *Krug v. Santa Fe Pacific*

² In *Lade v. Udall*, 432 F.2d 254 (9th Cir. 1970) the Court followed *Battle Mountain*. There the facts were the same except that the land was conveyed after the rights were recorded and not before as in *Battle*. To the same effect *Richard M. Lade*, 1 IBLA 189 (1970); *Richard M. Lade*, 1 IBLA 192 (1970).

R.R., 329 U.S. 591 (1947), which reviewed two departmental decisions which had denied Santa Fe's application for certain indemnity rights.⁴ In each case, but under separate statutes, Santa Fe had relinquished, by deed to the United States, lands to which its right under a land grant had vested. The Court held:

* * * The railroad urges that these claims are not covered by the Act or by the release. They, allegedly, are not claims "on account of" or "under any grant" of lands, but rest on contractual exchanges of lands made under the Acts of 1874 and 1904. 18 Stat. 194; 33 Stat. 556. These Acts largely represented a congressional effort to settle conflicts among railroads, Government, and settlers, which arose by reason of settlement by homesteaders on railroad-granted lands after the grants had been made. Both Acts provided that where settlers had so occupied railroad-granted lands, the railroad could, upon relinquishment of its title to them, select other lands in lieu of them. The procedure for selecting the lieu lands under the 1874 and 1904 Acts was substantially identical to the original procedure provided by the Acts for selection of indemnity lands. Before the 1940 Act respondent had, under the 1874 and 1904 Acts, relinquished title to the Government to certain lands previously granted. In August 1940, and subse-

quently in March 1943, respondent filed applications with the Secretary of the Interior to select its lieu lands. After the respondent signed the release, and because of it, the Secretary rejected the applications. The railroad then filed this suit in a Federal District Court for relief by injunction or by way of mandamus to require the Secretary and other Interior Department officials to pass on its applications without regard to the release. The District Court dismissed the bill on the merits, holding that the statute and release barred the claims. It read the 1940 Act as defining a congressional purpose "to wipe the slate clean of such claims by any railroad which enjoyed the benefits of the rate concessions made by the Transportation Act * * *" 57 F. Supp. 984, 987. The United States Court of Appeals for the District of Columbia reversed, holding, as respondent urges in this Court, that the 1940 Act did not apply to the type of claims involved here. 80 U.S. App. D.C. 360, 153 F.2d 305. Importance of the question decided caused us to grant certiorari.

We agree with the District Court. We think, as it held, that the Secretary of the Interior's construction of the 1940 Act was clearly right. Therefore, we do not discuss the Government's contention that, since the Secretary's construction was a reasonable one, it was an allowable exercise of his discretion which should not be set aside by injunction or relief in the nature of mandamus. See *Santa Fe P. R. v. Work*, 267 U.S. 511, 517; cf. *Santa Fe P. R. v. Lane*, 244 U.S. 492.

The respondent argues the case here as though the 1940 Act applied only to claims for "lands under any grant." The language is not so narrow. It also required railroads to surrender claims for "compensation, or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted * * * under any grant." (Italics supplied.) This language in itself indicates a purpose of

⁴ *Santa Fe Pacific Railroad Company*, 58 I.D. 596 (1944); *Santa Fe Pacific Railroad Company*, 58 I.D. 601 (1944). Other departmental decisions held that the release extinguished a railroad's unexercised right to select indemnity land, *Atlantic and Pacific Railroad Company*, 58 I.D. 577 (1944); that the transferee of a railroad's right to unselected indemnity land is not an innocent purchaser for value to whom a patent may be issued pursuant to the saving clause of sec. 321(b) of the Transportation Act, *supra*; *Atlantic and Pacific Railroad Company*, 58 I.D. 588 (1944); *Santa Fe Pacific Railroad Company*, 58 I.D. 591 (1944).

its draftsmen to utilize every term which could possibly be conceived to give the required release a scope so broad that it would put an end to future controversies, administrative difficulties, and claims growing out of land grants. Beyond a doubt, the words "compensation" and "reimbursement" as ordinarily understood would describe a payment to railroads in money or in kind for the surrender of lands previously acquired by them "under a grant." If they do not have this meaning, their use in the Act would have been hardly more than surplusage. And when viewed in the context of the historical controversies and claims under the land grants, the conclusion that the 1940 Act covers claims such as respondent's seems inescapable.

The legislative history of the Act shows that Congress was familiar with these controversies. In 1929 it passed an Act intended to authorize and require judicial determination of land-grant claims of the Northern Pacific Railroad in order finally and completely to set them at rest. 46 Stat. 41. The suit authorized by that Act was tried in a Federal District Court and was pending in this Court when the 1940 Act was passed. *United States v. Northern Pac. Ry.*, 311 U.S. 317. Our decision in it shows the complexity and ramifications of the numerous questions involved in land-grant controversies. Reference to this case was made by Government officials in urging Congress to include in the predecessors of the 1940 Act a requirement that the railroad surrender all claims arising out of land grants as a prerequisite to any Government rate concessions. Here, as in the 1929 Act, which applied to the claims of only one railroad, we think Congress intended to bar any future claims by all accepting railroads which arose out of any or all of the land-grant acts, insofar as those claims arose from originally granted, indemnity or lieu lands. All the Acts here involved, the Acts of 1866, 1874, 1904 and 1940, relate to a continuous stream of interrelated transactions and controversies, all basically stemming

from one thing—the land grants. We think Congress wrote *finis* to all these claims for all railroads which accepted the Act by executing releases. (329 U.S. at 596-598.)

To emphasize—the Court held that the release included a payment to the railroad in money or in kind for surrender of lands previously acquired by them under a grant. In this case, as in those, the indemnity rights of the railroad were "payments in kind" for the surrender of lands previously acquired by it under a grant. So here, too, they fall within one release.

Appellants seek to distinguish these cases from *Krug*. They assert that the release did not apply to lands "patented" to Santa Fe. In support they cite *Santa Fe Pacific R. R. v. Cord*, 482 P. 2d 503 (Ariz. 1971); *cert. denied*, 404 U.S. 912 (1971). There Santa Fe had conveyed land to the United States pursuant to the Act of June 4, 1897, *supra*, and had sold powers of attorney based upon that reconveyance. In 1955 and later, Santa Fe obtained quitclaim deeds from the United States for the base lands and conveyed them to the heirs of the original purchasers of the powers of attorney. Cord and Wheeler, who there, too, held the powers through mesne conveyances, filed suit, alleging that Santa Fe had destroyed their selection rights, and asked damages. In holding for the plaintiff, the Court rejected Santa Fe's contention that its release had terminated the forest lieu selection rights in 1941. The Arizona Court held that *Krug* applied only to

"granted" land and not to land that had been patented, that once land had been patented they are no longer "grant-lands."

This distinction is not persuasive. The Arizona Court reasoned that "grant-lands" were lands to which the railroads had an unperfected right whereas patented lands were lands to which the railroads were perfected and were thus no longer "grant-lands."

The distinction between lands to which a railroad has a perfected or unperfected right does not depend upon whether a patent has issued. A railroad's rights to land falling within the place limits of the grant vest upon its filing of a map of definite location showing the route of the road. *Tarpey v. Madsen*, 178 U.S. 215, 223, 227 (1900).

Thus the right of the railroad to the land within its place limits was vested and it could not be deprived of it without its consent.⁵ *Santa Fe Pacific Railroad Company*, 58 I.D. 596, 600 (1944). Accordingly, the distinction between granted and vested, but not patented, and patented land is not substantive enough to hold that unsatisfied lieu or indemnity rights stemming from the former are cut off by the release but those arising from the latter are not.

The exception in the statute and release pertains to patented lands

made pursuant to a grant, which were not reconveyed to the United States and which did not serve as base for lieu or indemnity selection rights or any other form of compensation or reimbursement then unsatisfied.

We note that in *Krug* the railroad's right to the base lands was conveyed to the United States by a deed, although no patent had previously issued. Therefore, we cannot ascribe the same importance as the Arizona Court, to the fact that a patent had issued.⁶

⁵ The District Court decision, *Santa Fe Pacific R.R. v. Ickes*, 57 F. Supp. 984, 986, 987 (D.C. 1944), which *Krug* affirmed, stated:

"The issue therefore is whether the release embraces, and thereby extinguishes, the right to select lands in lieu of relinquished lands under the Acts of 1904 and 1874, *supra*, respectively.

"The release embraces any and all claims of whatever description to lands and interests therein granted by any Act of Congress to plaintiff or any predecessor in aid of the construction of any portion of its railroad. Plaintiff's right to select lieu lands is a claim to lands, and this is not disputed. Plaintiff does contend, however, that it is not a claim to lands granted by any Act of Congress in aid of construction; that is, that the Acts of 1904 and 1874, *supra*, are not granting acts in aid of construction, and therefore that such claim is not included in the release.

"The Act of 1866, *supra*, under which plaintiff's predecessor acquired title to the lands relinquished, is concededly a granting act in aid of construction. The Acts of 1904 and 1874, *supra*, are supplemental to, and in legal effect amendatory of, the Act of 1866, *supra*. They made provision for the relief of settlers who were found to be occupying the lands of the railroad company. They gave the railroad company the right to select equal quantities of lands in lieu of lands which they relinquished for the benefit of such settlers. They were measures found to be desirable by reason of unforeseen developments arising out of the operation of the railroad land grant acts. The plaintiff itself probably was not without selfish motive in the relinquishment of its lands, which tended to prevent an exodus of established

⁶ An apparent exception is that a patent will not issue if land is found to be mineral in character at any time prior to the issuance of a patent. *Burden v. Northern Pacific R.R.*, 154 U.S. 288 (1894); *Southern Pacific Company*, 71 I.D. 224, 228 (1964).

We conclude that the Act of 1897, *as amended*, supplemented the original granting Act of 1866, *supra*, and that the unperfected rights to select lieu lands were extinguished by the release of 1941.

The appellants also point to the Acts of August 5, 1955, 69 Stat. 534, and August 31, 1964, 78 Stat. 751 (both appearing in notes following 43 U.S.C. § 274 (1970)). They contend that the 1955 statute specifically recognized the validity of their holdings under the proviso for recording "a forest lieu selection right, assertable under the act of March 3, 1905." They remark that the 1964 Act provided for the cash satisfaction of properly recorded forest lieu scrip in the name of the present holder as an assignee and that it is not necessary to apply for cash redemption as an attorney-in-fact. They also contend that the

settlers along its right of way who without conscious fault found themselves without title.

"As I perceive the intent of Congress, from the language of the statutes themselves, the lieu lands, when selected, were to be, so far as humanly possible, a counterpart of, and in substitution for, the original lands granted, and were to be lands granted by Congress in aid of construction, precisely as were the original lands. The Act of 1904, *supra*, gives the right to select public lands of equal quality and contemplates a substitution of section for section. The Act of 1874, *supra*, gives the right to select 'an equal quantity of other lands in lieu thereof from any of the public lands not mineral and within the limits of the grant not otherwise appropriated at the date of selection, to which they [railroad grantees] shall receive title the same as though originally granted.'

"The three Acts are each a part of the same legislative scheme and purpose to grant lands in aid of construction of railroads. The subsequent Acts are not independent granting Acts without relation to any other grant, but are clearly dependent upon, and supplemental to, the grant contained in the Act of 1866, *supra*, and provide for grants contingent upon

1960 and 1964 Acts revived any prior extinguished forest lieu right which might have been released by the railroad to the end that the scrip rights of the present holders must be recognized.

While the 1964 Act, *supra*, recognized the rights of assignees of forest lieu rights, it did not revive rights which had previously been extinguished.

The appointment of an attorney-in-fact by the railroad was a contract between the railroad and the appointee. As noted above, the United States accrued no liability when it dealt with the principal even though the principal may have acted in the derogation of the rights of its appointed attorneys-in-fact.⁷ The aggrievement, if there be one, is

the relinquishment of lands granted under such Act. In other words, the Acts of 1904 and 1874, *supra*, are, respectively, granting Acts in aid of construction when coupled, as they must be, with the Act of 1866, *supra*.

"The fact, as contended by plaintiff, that it gave a consideration, namely a deed to the lands relinquished, for the right to select others, does not make either of the Acts any less a grant. A railroad land grant is not a gift, but is a transfer of title to lands in return for the construction and operation of a railroad. Nor, as urged by plaintiff, does the fact that plaintiff's rights are contractual remove the applicable statutes from the category of granting statutes.

"Under these circumstances, I am of the opinion that these unperfected rights of plaintiff to select lieu lands are claims to lands granted by Acts of Congress to plaintiff in aid of the construction of its railroad, and are therefore within the scope of, and extinguished by, the release, which was given in pursuance of an apparent Congressional purpose to wipe the slate clean of such claims by any railroad which enjoyed the benefits of the rate concessions made by the Transportation Act of 1940."

⁷ In *Krug*, the railroad had filed a selection list for lands in satisfaction of forest lieu rights. The selection was pending at the date the release was signed.

between the attorney-in-fact (the scrip purchaser) and the railroad; it is not between the attorney-in-fact and the United States. *Battle Mountain, supra; Wheeler, supra.*

We conclude that Santa Fe's 1897 lieu rights were extinguished when it executed its release under the Transportation Act and that there is no present right under the 1897 Act which the railroad or its attorneys-in-fact may exert against the Government. The alleged scrip rights claimed by appellants as derived from the railroad are without efficacy or validity.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

MARTIN RITVO, *Member.*

WE CONCUR:

FREDERICK FISHMAN, *Member.*

JOAN B. THOMPSON, *Member.*

ESTATE OF MARIANO EUSEBIO

2 IBIA 24

Decided May 16, 1973

Appeal from Judge's decision after rehearing, ordering the moiety of the paternal grandparents to escheat to the Papago Indian Tribe for want of a lawful heir.

Reversed in part.

285.0 Indian Probate: Inheriting:
Generally

There is a presumption that a decedent left heirs or next of kin capable of inheriting. Where there is the possibility of an escheat the presumption is even stronger, and the burden shifts to those favoring escheat to prove there are not heirs as escheats are not favored by the law.

285.4 Indian Probate: Inheriting:
Moiety

A moiety is defined as a one-half interest in an estate.

285.4 Indian Probate: Inheriting:
Moiety

Where there are no descendants of the paternal grandparents the paternal moiety passes to the heirs of the maternal grandparents.

APPEARANCES: Lindsay Brew, Esquire, for appellants Maria Dolores Rios and Theresa Pancho Orosco.

OPINION BY MR. SABAGH INTERIOR BOARD OF INDIAN APPEALS

This matter comes before the Board on appeal from the Administrative Law Judge's decision and order after rehearing, escheating the moiety of the paternal grandparents to the Papago Indian Tribe for want of a lawful heir.

Mariano Eusebio died intestate at the age of 69 years leaving land interests in Arizona. He was survived neither by spouse, children, issue, mother, father, sisters nor brothers. Hearings were held by Administrative Law Judge, Indian Probate, William J. Truswell, on June 24 and August 31, 1971, and certain descendants of the maternal grandparents were determined to be the

lawful heirs of the decedent. Upon rehearing on December 8, 1971, certain half-blood descendants were also determined to be lawful heirs and entitled to share in the moiety of the maternal grandparents. The Administrative Law Judge further determined that no heirs could be found for that moiety belonging to the paternal grandparents. Accordingly, he decreed that this moiety, one-half of the estate of the decedent, would escheat to the Papago Indian Tribe.

An appeal was filed by heirs of the maternal grandparents wherein it was contended in substance that where no heirs to one moiety could be traced, that moiety and the entire estate passed to the side having heirs and did not escheat to the Tribe.

It is elementary, to say the least, that the law frowns on nor does it favor escheat. It is presumed that a decedent left heirs or next of kin capable of inheriting property. *In re Wallin's Estate*, 490 P.2d. 863, 16 Ariz. App. 34 (1971).

When an individual dies intestate the law devolves the title to his estate upon those who by virtue of the law of the place where the land lies are his heirs. The right of inheritance is purely a matter of legislative discretion. The descent of real property is governed by the law in force at the time of the death of an intestate. *In re Rattray's Estate*, 82 P.2d. 625 (Cal. App. 1938).

Arizona Revised Statute pertaining to intestate succession § 14-202 subsec. 4, provides that:

When a person having an estate of inheritance, real, personal or mixed, dies intestate as to the estate, and was not survived by spouse, children, issue, mother, father, brothers, or sisters, * * * then the estate shall be divided into moieties, one of which shall go to the paternal grandparents and their descendants, and the other to the maternal grandparents and their descendants, who shall take their moiety as parents of the intestate would have taken if living, and so on without end.

A moiety is defined as a one-half interest in an estate. *Young v. Smithers*, 205 S.W. 949, 181 Ky. 847 (1918). This variation (moiety) ultimately found acceptance in a dozen states throughout the country.

Arizona statutes make no reference to paternal or maternal kindred further removed than grandparents nor do they provide for devolution of a moiety once the grandparents on the one side die leaving no descendants. The Arizona Court of Appeals, however, concluded that descendants of the maternal great-grandparents were entitled to share the moiety where the maternal grandparents died leaving no descendants. The court said in part:

"* * * and so on without end" indicate that there was no intent to cut off the rights of heirs who were descendants of ancestors of the grandparents. * * *

State of Arizona v. Tullar, 462 P.2d. 409, 412, 11 Ariz. App. 112 (1969).

A.R.S. § 14-202, subsec. 4 originally appeared in the Arizona statutes as § 2116, R.S. (1901), and was taken from article 1688 (4), Texas Revised Statutes (1895). The two statutes are identical. The part

§ 2116, R.S. (1901) pertinent to our case reads as follows:

* * * If there be no surviving grandfather or grandmother, then the whole of such estate shall go to their descendants, and so on without end, *passing in like manner to the nearest lineal ancestors and their descendants.* (Italics supplied.)

In contrast to *Tullar, supra*, there were no descendants of the great-grandparents in this case.

In revising and codifying the laws of the State of Arizona the code commissioner was authorized in the interest of brevity to delete the words underscored immediately above, ch. 35 § 3 (1925) Ariz. Sess. See also, *State v. Tullar, supra*.

When a statute is adopted from another state, it is presumed that it is taken with the construction placed on it by the courts of the state of origin prior to its adoption. *State v. Tullar, supra*.

The court in *England v. Ally Ong Hing*, 459 P.2d 498, 105 Ariz. 65 (1969) said:

"Although we are not bound by the construction given a statute by the courts of the state from which it was adopted, we consider such construction to be persuasive."

In construing Arizona Revised Statute § 14-202 subsec. 4 pertaining to intestate succession, the court in *State v. Tullar, supra*, said:

* * * we look to A.R.S. § 1-211 which states that statutes should be construed liberally to effect their object and promote justice. * * *

The court in *Hartley v. Langdon*, 347 S.W. 2d. 749, 758 (C.C.A. Tex. 1961) said in part:

* * * If there are kindred on only the one side, then there could be no object in dividing the estate because there would be none to take on the other side. * * *

The intent of the legislators to avoid escheat is illustrated by several state statutes relating to intestate succession which expressly provide that where there is no kindred on one part, that moiety is to go to the other part. Fla. Stat. 1955, § 731.23; Ky. Rev. Stat. § 391.010; W. Va. Code 1955, § 4080; District of Columbia Code 1951, § 18-101.

The Court of Appeals of Kentucky in *Young v. Smithers, supra*, in pertinent part held that "where there is no kindred on the one side then the whole estate will pass to the kindred on the side which survives * * *."

To recapitulate, the decedent died intestate survived neither by spouse, children, issue, mother, father, sisters, nor brothers. Pursuant to Arizona statute and revised statute, the decedent's estate divides into two moieties, one going to the paternal grandparents and their descendants and the other to the maternal grandparents and their descendants. There were no paternal grandparents or descendants thereof. No mention is made in the Arizona statutes as to what happens to a moiety where there are no kindred on the one side, *i.e.*, whether the moiety passes to heirs of the maternal grandparents or escheats to the state. However, the State frowns on escheat. The Arizona statutory

provisions relating to moieties was adopted from the State of Texas statute relating thereto. It is presumed that it was adopted with the construction placed on it by the courts of the state of origin prior to adoption, *see State v. Tullar, supra*, or such construction is considered to be persuasive, *see England v. Ally Ong Hing, supra*. The Texas Court of Appeals in *Hartley v. Langdon, supra*, at 758, said that, " * * * If there are kindred on only one side that there could be no object in dividing the estate because there would be none to take on the other side. * * * " This is reiterated in several state statutes. In addition, the Court of Appeals in *Young v. Smithers, supra*, unequivocally held that "Where there is no kindred on the one side then the whole estate will pass to the kindred on the side which survives." Finally, in *State v. Tullar, supra*, referring to A.R.S. § 1-211 we are reminded that "statutes shall be construed liberally to effect their object and to promote justice."

From the foregoing, the conclusion is inevitable that the Legislature intended the moiety of the paternal grandparents to pass to the already determined heirs of the maternal grandparents, and we so hold.

Therefore, pursuant to the authority, delegated to the Board of Indian Appeals, by the Secretary of the Interior, 43 CFR 4.1, that part of the decision of the Administrative Law Judge escheating the paternal moiety to the Tribe for want of an heir is reversed, and it is ORDERED:

That the moiety of the paternal grandparents pass and be distributed to the named heirs of the maternal grandparents as previously determined by the Administrative Law Judge.

This decision is final for the Department.

MITCHELL J. SABAGH, *Member*.

I CONCUR:

DAVID J. MCKEE, *Chairman*.

STATE OF MONTANA

11 IBLA 3

Decided May 17, 1973

Appeal by the State of Montana from decision M 19544 by the Montana State Director, Bureau of Land Management, holding a lake to be non-navigable, and asserting title in the United States to the bed of the lake.

Affirmed.

Navigable Waters

A lake is navigable in fact when it is used, or is susceptible of being used, in its ordinary condition, as a highway for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. A meandered lake in Montana, containing 125 acres and which is not over waist deep, is nonnavigable where it is located in a remote region and there is no evidence to show that it has been used in the past or is susceptible of being used as a highway for commerce in the future.

Navigable Waters

Title to the underlying bed of a meandered lake which is held to be non-

May 17, 1973

navigable remains in the United States where all of the abutting uplands surrounding the lake are still public lands.

Secretary of the Interior—Navigable Waters—Public Lands: Jurisdiction Over—Title: Generally

The Secretary of the Interior has the authority and the duty to determine what lands are public lands of the United States, including the authority to determine navigability of a lake to ascertain whether title to the land underlying the lake remains in the United States or whether title passed to a State upon its admission into the Union.

APPEARANCES: Lawrence D. Huss, Esq., Office of the Attorney General, State of Montana, Helena, Montana, for appellant; David K. Grayson, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for appellee, Bureau of Land Management.

**OPINION BY MRS. LEWIS
INTERIOR BOARD OF LAND
APPEALS**

The State of Montana, by and through its Commissioner of State Lands, appealed from a decision by the Montana State Director, Bureau of Land Management (BLM), dated November 2, 1971. The decision held Indian Lake to be non-navigable and asserted title in the United States to the lands covered by the lake.¹

The State maintains that it was granted title to all lands underlying navigable bodies of water upon its admission to statehood in 1889, and that Indian Lake was a navigable body of water at that time.

¹ The controversy arose over the desire of both the State and BLM to lease the lands for oil and gas.

Since the United States Supreme Court decision in *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.), 212 (1845), it has been recognized that the lands under navigable bodies of water within the limits of a State passed to the State when it was admitted into the Union as an incident of sovereignty. Therefore, the first question to be determined in this proceeding is whether Indian Lake was navigable in 1889.

The record discloses that Indian Lake is meandered and contains approximately 125 acres.² The facts on which the decision below was based are set forth in a preceding letter dated September 30, 1971, from the BLM State Director to the Montana Commissioner of State Lands, as follows:

* * * * *

We realize Section 26-336, Revised Codes of Montana, 1947, read (sic) in part as follows:

"Definition and use of lakes as navigable waters. All lakes wholly or partly within this state, *which have been meandered and returned as navigable by the surveyors employed by the government of the United States.* * * *" (Italics added by BLM.)

This definition is not compatible with the instructions given cadastral surveyors.

In the original surveys of the public domain, cadastral surveyors were instructed to meander the banks of all streams if more than three chains in width and the shores of all lakes having an area of

² The lake is located in Secs. 21 and 22, T. 23 N., R. 30 E., P.M., Montana, and is entirely surrounded by lots bordering on the meander line. All of the lots are public lands. Thus, if the lake is nonnavigable, title to the bed of the lake would be in the United States. See *Rust-Owen Lumber Company (On Rehearing)*, 50 L.D. 678, 682 (1924).

25 acres or more. This, of course, has nothing to do with navigability. The surveyors of the public domain were not instructed to make any determination relative to navigability of waterways during their surveys, and had no authority to do so.

Navigability is a matter of usage at the time the state entered the Union, not a determination by investigation or land survey. Montana was admitted to the Union November 8, 1889, and our records do not reflect principal routes of travel in the vicinity of Indian Lake which might have made it possible for the lake to have been used for commercial travel if enough water were present.

The area in which Indian Lake is situated is in a somewhat remote area, which was the condition in 1889 as it is today.

The general description as contained in the 1920 official survey record of T 23 N, R 30 E, states: "Indian Lake is a shallow lake, nowhere being over waist deep, but always containing nearly a full supply of water and was therefore meandered, as it contains about 125 acres."

Based on the above facts and statements, it is our considered decision Indian Lake was not a navigable body of water when Montana was admitted to the Union. The Lake is completely surrounded by federal land, and the U.S. Government, therefore, also claims ownership of the bed of the lake.

In the middle 60's the lake was visited by our Malta District field personnel and was found to be nothing more than a dry lake bed. Because of its being a dry lake bed, the Federal Government would still hold claim to the dry bed based on their littoral rights of reliction.

* * * * *

Montana does not attempt to controvert the facts upon which the BLM State Director based his decision. Instead its brief is confined to legal arguments as to why the lake should be considered as navigable in fact.

Although admitting that the fact the lake has been meandered is not conclusive evidence of its navigability, the State feels that it indicates the surveyors considered the body of water of sufficient size to be considered an obstacle to surveying. The fact remains that the meandering of bodies of water in surveying the public lands is done for convenience and has nothing whatsoever to do with determining navigability, which is a question of federal law to be determined according to the general rule recognized and applied in in the federal courts. *United States v. Holt State Bank*, 270 U.S. 49, 55-56 (1926). The surveyors have no authority to make such determinations.

The State quoted the widely accepted definition of navigability by the United States Supreme Court as set forth in *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870):

* * * Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. * * *

In this connection the State contends that the phrases "or are susceptible of being used" and "may be conducted" do not require actual use but possible use (susceptible use); that it is not incumbent upon the

³ The Court has held this test to be applicable not only to "rivers" but to all water courses, including lakes. *Utah v. United States*, 403 U.S. 9, 11 (1971); *United States v. Holt State Bank*, *supra*, at 56.

states to make a showing of actual past use of bodies of water, but only that they may have been used; and that the fact that the lake may have not been consistently used for travel is irrelevant and immaterial.

The State further asserts that the surveys of the government indicate that Indian Lake was a body of water of sufficient depth to accommodate the passage of flat bottom barges, canoes, rafts, and other modes of water travel commonly used by the Indian and pioneering populace of the western states. This is mere conjecture, as there is no evidence in the record to this effect, or to indicate that the lake has been used in the past or is susceptible of being used as a highway for commerce at present or in the future, nor has the State presented any such evidence. We do not rule out the possibility that it may have been used occasionally in the past by Indians or pioneers for fishing or boating in canoes or flat bottom boats, or that it may still be used by an occasional sportsman for similar recreational purposes. However, such uses could hardly be said to constitute the lake as a highway for commerce which is essential for a navigability classification.

In its reply to the State's appeal brief, BLM attached a copy of the northwest corner of the U.S. Geological Survey Quadrangle map entitled "Indian Lake, Mont." (1965) showing Indian Lake. This map shows an unimproved dirt road, the course of which would have taken it directly through the middle of the

lake. BLM stated: "Rather than attempt to join the two parts of this road by a system involving navigation of Indian Lake, the road builders simply ran their road around the lake." As the State did not question the propriety of this map, although it was afforded an opportunity by this Board to file an answer to the BLM brief, the map is accepted in evidence. It is strong persuasive evidence that the road builders chose the path of least resistance in skirting the lake.

We agree with the following rationale of BLM in its reply brief:

No evidence of any commercial use exists in this case, and that is not surprising. It passes credibility that intelligent "traders or travelers" would have undergone the expense and bother of maintaining vessels of virtually no draft (since Indian Lake is not more than waist deep, it is probable that much of the area near the shore is considerably more shallow) in order to effect a "highway for commerce" across a lake containing only 125 acres. Common sense dictates that such hypothetical traders or travelers would rather have formed their highway for commerce so as to go around Indian Lake.

Montana attempts to compare Indian Lake with the lake which was held navigable by the Court in *United States v. Holt State Bank*, *supra*, although the Court there noted that the lake ranged from three to six feet deep and that navigation was limited because trade and travel in the vicinity was limited. Any comparison between the two lakes stops with a similarity in depth. Mud Lake in Minnesota, which was involved in that case,

covered almost 5,000 acres and in its natural and ordinary condition was from three to six feet deep. The Court set forth the following additional statements of fact upon which its conclusion of navigability was based:

* * * Mud River traversed it [Mud Lake] in such way that it might well be characterized as an enlarged section of that stream. Early visitors and settlers in that vicinity used the river and lake as a route of travel, employing the small boats of the period for the purpose. The country about had been part of the bed of the glacial Lake Agassiz and was still swampy, so that waterways were the only dependable routes for trade and travel. Mud River after passing through the lake connected at Thief River with a navigable route extending westward to the Red River of the North and thence northward into the British possessions. Merchants in the settlements at Liner and Grygla, which were several miles up Mud River from the lake, used the river and lake in sending for and bringing in their supplies. True, the navigation was limited, but this was because trade and travel in that vicinity were limited. In seasons of great drought there was difficulty in getting boats up the river and through the lake, but this was exceptional, the usual conditions being as just stated. * * * *Id.* at 56-57.

In *United States v. Oregon*, 295 U.S. 1 (1935), the Supreme Court held five bodies of water in Oregon to be nonnavigable, even though some 10,800 acres of one of the lakes were between 3 and 4 feet deep and in spite of evidence of some actual use of the lakes for boating. In *John Snyder, State of Montana*, 72 I.D. 527 (1965), this Department determined that a shallow lake in Montana approximately a mile long and a half-mile wide did not meet the

test of a navigable body of water set forth by the Supreme Court. The Department has also held that an inland lake, two miles long and three-fourths of a mile wide, is not navigable in the sense that its waters can be put to a public use for the purpose of trade or commerce. *Reuben Richardson*, 3 L.D. 201 (1883).

A United States District Court recently declared a 47-mile segment of a river to be nonnavigable although it was currently being used by very light sporting craft such as canoes, kayaks and rubber rafts. The Court stated: "It would be an affront to the public's intelligence to classify the river presently suitable for any kind of commercial navigation." *United States v. Crow, Pope & Land Enterprises, Inc.*, 340 F. Supp. 25, 34 (N.D. Ga. 1972).

Accordingly, we find that Indian Lake is not navigable as it does not meet the navigability test of the Supreme Court. Therefore, title to the lakebed is in the United States.

Finally, the State contends that this proceeding defies even the rudimentary principle of due process of law because the same administrative agency charged with the administration of the public lands is being called upon to decide the title of this land.

We find that appellant is not denied due process by this proceeding. The authority and the duty of the Secretary of the Interior to consider and determine what lands are public lands of the United States have been well established. See *Burt A. Wackerli*, 73 I.D. 280, 286 (1966). Furthermore, Montana has the right

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to appeal to the courts for judicial review of the decision herein.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision below is hereby affirmed.

ANNE POINDEXTER LEWIS, *Member*.

WE CONCUR:

EDWARD W. STUEBING, *Member*.

MARTIN RITVO, *Member*.

**ASSOCIATED DRILLING COMPANY,
INC. (KEPHART MINE)**

2 IBMA 95

Decided May 17, 1973

Associated Drilling Company, Inc., appealing a decision of December 5, 1972, by Administrative Law Judge Littlefield assessing \$550 for 11 violations pursuant to section 109 of the Federal Coal Mine Health and Safety Act of 1969.

Reversed in Part and Remanded.

Federal Coal Mine Health and Safety Act of 1969: Generally—Administrative Procedure: Decisions

It is error for an Administrative Law Judge to fail to make appropriate findings of fact and conclusions of law and to show the reasons therefor in his decision in any proceeding brought pursuant to section 109 of the Act (30 U.S.C. § 819) with respect to the occurrence of each violation alleged and as to each of the statutory criteria required by such sec-

tion to be considered. Where such findings and conclusions are merely not labeled or mislabeled the Board will not normally remand; however, where these requisites are obfuscated or absent, a remand may be necessary to permit proper administrative and judicial review.

Federal Coal Mine Health and Safety Act of 1969: Penalties: Existence of Violation

Since section 303(g) of the Act requires weekly ventilation examinations to be made in all underground coal mines and the air volume measurement to be recorded in a book *approved by the Secretary*, an operator cannot properly be charged for a violation of that section for merely failing to record such measurements when the Secretary had not yet approved the book for recording such measurements at the time of inspection.

Federal Coal Mine Health and Safety Act of 1969: Penalties—Administrative Procedure: Decisions

Where an Administrative Law Judge is confronted with a factual determination of the effect of the amount of the penalty on the ability of an operator to continue in business under section 109(a)(1) of the Act, and the record contains no evidence on that criterion, the Judge should apply the presumption of no adverse effect in making the necessary findings.

APPEARANCES: Benjamin Novak, Esquire, and Richard M. Sharp, Esquire, in behalf of appellant, Associated Drilling Company, Inc.; Robert W. Long, Associate Solicitor, J. Philip Smith, Assistant Solicitor, Richard V. Backley, Trial Attorney, in behalf of appellee, U.S. Bureau of Mines.

OPINION BY MR. DOANE
INTERIOR BOARD OF MINE
OPERATIONS APPEALS

Factual and Procedural
Background

A Petition for Assessment of Civil Penalty was filed by the Bureau of Mines (Bureau) on June 28, 1971, alleging 13 violations by Associated Drilling Company, Inc.,

(Associated) of the Federal Coal Mine Health and Safety Act of 1969 (hereinafter, "the Act").¹ Two of the alleged violations (303(j), 2 RGN, 6-2-70; 304(d), 4 RGN, 11-5-70) were vacated by the Judge after a hearing on the merits held April 11, 1972. The Judge assessed \$550 for the remaining 11 violations as follows:

Section of the Act	Notice Number	Date	Penalty Assessed
303(h)(1)-----	1 RGN-----	6- 2-70	\$40
303(g)(2)-----	2 RGN-----	11- 5-70	25
303(b)-----	3 RGN-----	11- 5-70	60
303(k)-----	5 RGN-----	11- 5-70	25
302(a)-----	1 RGN-----	11-10-70	25
304(a)-----	2 RGN-----	11-10-70	100
305(k)-----	3 RGN-----	11-10-70	100
311(b)-----	4 RGN-----	11-10-70	25
311(c)-----	5 RGN-----	11-10-70	25
304(a)-----	1 RGN-----	11-13-70	100
303(y)(1)-----	1 RGN-----	11-17-70	25
Total			\$550

Contentions of the Parties

Associated contends (1) that the Judge failed to make specific findings and to state reasons for his findings and conclusions on all of the material issues of fact, law, and discretion presented on the record; (2) that it did not violate section 303(g) of the Act as found by the Judge; and (3) that the Bureau failed to establish the occurrence of the remaining violations by a preponderance of the evidence.

The Bureau contends that the Judge properly found that the violations occurred and that he satisfied

the requirements of the Administrative Procedure Act (APA).²

Issues Presented on Appeal

I

Does the Judge's decision comport with the requirements of section 557 of the APA?

II

Did the Judge err in determining that Associated violated section 303(g) of the Act?

¹ P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

² 5 U.S.C.A. § 557.

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III

Did the Bureau sustain its burden of proving the remaining violations of the Act?

Discussion of the Issues

I

The Board finds from reading the Judge's decision that it clearly fails to meet the following minimum requirements for an initial or recommended decision as set forth in section 557 of the APA:

* * * All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

The Board held in *Lucas Coal Company*, 1 IBMA 138, 141, 79 I.D. 425, 427, 2 CCH Employment Safety and Health Guide par. 15-378 at p. 20,542 (1972): “* * * [I]n the absence of findings, it is impossible for us to review the decision adequately.”³

Analysis of the Judge's Decision

In the instant case, few, if any, reasons or ultimate findings can be found in the Judge's decision relating to the fact of violation or to the

six statutory criteria. Analyzing the decision as it is presently constituted, the eight items enumerated by the Judge under “Findings of Fact” amount to three conclusions of law, four “basic” findings of fact, and only one “ultimate” finding of fact, i.e., “(7) The Respondent made a good faith effort to achieve rapid compliance after being informed of the violations.” (Judge's decision, hereinafter Dec. 3.)

With respect to the Judge's four “Conclusions of Law” (Dec. 4), the first two are simply background statements; the third, that the Act has been violated, is a correct conclusion of law, but is without direct support in the findings of fact; and the fourth is a mere recitation of a statutory provision.

Under the caption “Civil Penalty” (Dec. 4), the Judge discussed but made no findings as to the ability of the operator to continue in business.⁴ In the same section, the Judge unnecessarily repeated three basic findings of fact, referring to them as “extenuating circumstances” without demonstrating their relevance to the decision.

Finally, under the subtitle “Application of Assessment” (Dec. 4), the Judge stated with respect to the six criteria in section 109(a)(1) of

³ See *Anglo-Canadian Shipping Co., Ltd., et al. v. Federal Maritime Commission*, 310 F.2d 606 (1962), which stated at 617:

“* * * [T]he absence of required findings is fatal to the validity of an administrative decision regardless of whether there may be in the record evidence to support proper findings. * * *”

⁴ The Judge erred by failing to clearly apply the presumption expressed in *Hall Coal Company, Inc.*, 1 IBMA 175, 179, 79 I.D. 668, 672, 2 CCH Employment Safety and Health Guide par. 15,380, at p. 20,548 (1972):

“The evidence of whether a penalty will affect the ability of the operator to stay in business is, of course, peculiarly under the operator's control. There is, therefore, a presumption that the operator will not be so affected in the absence of contrary evidence.”

the Act: "* * * [A]ll evidence in the record bearing on the criterion [sic] have been considered." The Judge then proceeded to make ultimate findings of fact on some, but not all, of the criteria with respect to 11 alleged violations, and assigned amounts of penalty presumably based thereon. However, no basic findings or reasons for the ultimate findings of negligence or gravity were set out.⁵

Under the same subtitle, "Application of Assessment," the Judge *vacated* two notices in summary fashion, *i.e.*, without stating any reasons for his findings of "No violation." The Board finds that the Judge again erred by taking dispositive action on a material aspect of this case based on an improperly stated conclusion of law and without showing supporting findings and reasons.⁶

In the adjudication of every notice of violation, the Judge must

⁵ The Judge speaks of a "serious" violation, which the Board believes is a reference to "gravity" in section 109(a)(1) of the Act.

⁶ See *Bell Lines Inc. v. U.S.*, 263 F. Supp. 40 (D.C.W.Va. 1967), at 46:

"* * * [T]he requirements of the Administrative Procedure Act are fundamental to due process and * * * all administrative decisions shall include such findings and conclusions as are reasonably necessary to intelligently inform the parties involved of the purport thereof, as well as the reasons therefor. * * *

In *USV Pharmaceutical Corp. v. Secretary of HEW*, 466 F.2d 455, 462 (D.C. Cir. 1972), it was stated:

"* * * As we have frequently emphasized, findings of fact are not mere procedural niceties; they are essential to the effective review of administrative decisions. Without findings of fact a reviewing court is unable to determine whether the decision reached by an administrative agency follows as a matter of law from the facts stated as its basis, and whether the facts so found have any substantial support in the evidence. * * *

make findings of fact, which, when compared with the relevant statutory or regulatory criteria, should lead him to a conclusion of law, *i.e.*, the Act was or was not violated. If the Judge's conclusion is that a violation of the Act occurred, he must then make ultimate findings of fact on *each* of the six statutory criteria in section 109(a)(1) and state reasons for each finding to properly determine the amount of the penalty warranted. When relying on specific testimony of a witness, citations to the transcript of the hearing may be one acceptable method of showing the reason(s) for making a required finding. These are requisites for an adequate understanding of the decision by the parties and for a meaningful administrative review by the Board if an appeal is taken.⁷

As a general rule, the Board will not remand an initial decision by an Administrative Law Judge simply because findings of fact and conclusions of law are mislabeled or unlabeled; however, where these requisites are obfuscated or absent,

⁷ "In discussing the necessary content of findings of fact, it will be helpful to spell out the process which a commission properly follows in reaching a decision. The process necessarily includes at least four parts: (1) evidence must be taken and weighed, both as to its accuracy and credibility; (2) from attentive consideration of this evidence a determination of facts of a basic or underlying nature must be reached; (3) from these basic facts the ultimate facts, usually in the language of the statute, are to be inferred, or not, as the case may be; (4) from this finding the decision will follow by the application of the statutory criterion. * * *" *Saginaw Broadcasting Co. v. F.O.C.*, 68 App. D.C. 282, 287, 96 F.2d 554, 559, *cert. denied*, *Gross v. Saginaw Broadcasting Co.*, 305 U.S. 613, 59 S. Ct. 72, 83 L. Ed. 391 (1938).

a remand may be necessary. (See *Lucas, supra.*)

II

The Judge erred in holding that a violation of section 303(g) of the Act occurred. The Bureau Inspector admitted and the Board finds that Associated was taking air measurements, but was failing to record the specific readings (Transcript of Hearing, hereinafter Tr. 64) as of November 5, 1970.

The Board has held in *Robert G. Lawson Coal Company*, 1 IBMA 115, 121, 79 I.D. 657, 2 CCH Employment Safety and Health Guide par. 15,374 at p. 20,536 (1972);

(6) Notice of Violation 4 GWH (7/27/70) charges a violation of section 303(g) for the failure of Lawson to take weekly air readings at the main return and for failure to record weekly air readings. Section 303(g) requires that:

"* * * A record of such measurements shall be recorded in ink or indelible pencil in a book approved by the Secretary * * *." (Italics added.)

Lawson correctly contends that the Secretary did not promulgate regulations concerning approved recording books until November 1970. See 30 CFR 75.1803 (35 F.R. 17890, Nov. 20, 1970). Since no recording book had been approved by the Secretary at the time of the inspection of Lawson's mine, the Bureau cannot properly charge Lawson with a failure to record the weekly air readings. Furthermore, Lawson's statement that he was making the air readings required by section 303(g) is unrefuted. The burden is upon the Bureau to prove that a violation did occur and since the record does not indicate the basis for the inspector's allegation we find that the Bureau has failed to prove a violation by a preponderance of the evidence. Therefore,

Notice No. 4 GWH (7/27/70) is VACATED.

We hold that *Lawson, supra*, controls the determination of the issue in the instant case. Therefore, the judge's decision must be reversed with respect to Notice of Violation 2 RGN (Exhibit 10), which is hereby vacated.

III

With respect to the remaining violations, including those which the Judge vacated, we conclude that the decision is too incomplete for the Board to determine how the Judge reached his result; therefore, a remand of this matter is necessary. The Board leaves to the Judge for reconsideration and redetermination whether the Bureau sustained its burden of proving each of the violations and the amount of the civil penalty warranted for each. In the course of making his redeterminations, the Judge should observe the principles set forth in I, *supra*.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that: (a) the Judge's decision with respect to Notice of Violation 2 RGN (Exhibit 10) IS REVERSED and the Notice IS VACATED, and (b) the remainder of this proceeding IS REMANDED for a new decision in accordance with the views expressed herein to include:

(1) findings of fact and conclusions of law as to the occurrence of each alleged violation;

(2) a determination of the amount of penalty warranted for each violation found to have occurred based upon stated findings of fact on each of the six criteria required to be considered by section 109 (a) (1) of the Act;

(3) findings of fact with respect to the credibility of witnesses and weight of the evidence where necessary; and

(4) the reasons for (1), (2) and (3) above.

DAVID DOANE, *Member*.

I concur in the result but would remand by simple order for a new initial decision:

C. E. ROGERS, JR., *Chairman*.

DUNCAN MILLER

11 IBLA 14

Decided May 21, 1973

Appeals from separate Bureau of Land Management decisions rejecting applications to suspend oil and gas leases M 039865 and U 040086.

Appeals dismissed.

Oil and Gas Leases: Generally—Oil and Gas Leases: Suspensions

An oil and gas lessee must comply with all the lease terms, including the operating regulations, at his own expense.

Rules of Practice: Appeals: Generally

An appeal will be dismissed where there is no justiciable issue or where the appeal is moot.

APPEARANCES: Duncan Miller, pro se.

OPINION BY MR. FRISHBERG INTERIOR BOARD OF LAND APPEALS

By separate identical instruments, dated February 22, 1973, Miller protested to the appropriate Bureau of Land Management offices and requested suspension of oil and gas leases M 039865 and U 040086. He asserted that "the word 'ecology' was not meaningful when the lease was issued." He requested a suspension of the lease terms to provide some sort of adjustment in order that he should not have to bear the full costs of compliance with operating requirements for the protection of the environment; he prayed that the lease terms be suspended. Neither petition was favorably considered by BLM.

Carrying his quest for relief to this Board via the appeals route, appellant urges that he is entitled to be freed from the burdens with which he has been saddled since the leases issued and which are now necessary to comply with the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.* (1970).

Each of the leases was issued effective March 1, 1964. Therefore, the annual rentals for the tenth year were due and payable on or before the anniversary date, March 1, 1973. The rental for the tenth year has not been paid for either lease. Even while the leases were in the last two weeks of the ninth year, no action had as yet been taken towards drilling or other operational activity. Thus, appellant would not be en-

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titled to a suspension of operations and production under 43 CFR 3103.3-8. Furthermore, a petition for relief under that regulation must be filed with the Regional Oil and Gas Supervisor of the Geological Survey—not with the Bureau of Land Management.

Compliance with law, regulations, stipulations, and conditions, including those pertaining to environmental protection and restoration, is an essential ingredient of the terms of an oil and gas lease. 30 U.S.C. § 189 (1970); *United States v. Forbes*, 36 F. Supp. 131 (1949) *aff'd* 125 F.2d 404, (9th Cir. 1942) *aff'd* 127 F.2d 862 (1942). The burden, including its financial aspects, of complying with environmental protection provisions, is the sole responsibility of the lessee. Appellant was previously informed to this effect. *Duncan Miller*, 10 IBLA 133 (1973); *see John Oakason*, 3 IBLA 148 (1971). In any event, since there was no drilling or development on the leaseholds appellant was never called upon to expend money for environmental protection. Nor can he be heard to complain of possible future contingencies which will never come to pass. Inasmuch as there has been no production on either lease, he is not entitled to a suspension under the cited regulation.

Under the circumstances of this case the question on appeal is rhetorical. Appellant has not expended moneys for which he seeks recompense or relief. And, since the leases lapsed for nonpayment of the an-

nual rentals due on March 1, 1973, 30 U.S.C. § 188 (1970), he will not be obliged to expend funds for environmental protection purposes in connection with the leases. It follows that there is no justiciable issue, and the appeals are moot.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeals are dismissed.

NEWTON FRISHBERG, *Chairman*.

WE CONCUR:

DOUGLAS E. HENRIQUES, *Member*.

EDWARD W. STUEBING, *Member*.

UNITED STATES v. MERLE I.
ZWEIFEL ET AL.

11 IBLA 53

Decided May 29, 1973

Appeal from a decision by Administrative Law Judge¹ L. K. Luoma in Colorado Contest 441 declaring appellants'² association placer mining claims null and void.

Affirmed.

Mining Claims: Discovery: Marketability

¹ The change of title of the hearing officer from "Hearing Examiner" to "Administrative Law Judge" was effected pursuant to order of the Civil Service Commission, 37 F.R. 16787 (August 19, 1972).

² Appellants are the contestees in Colorado Contest 441, as listed in Attachment No. 1 accompanying Judge Luoma's decision of February 25, 1972. *See* discussion under the heading *Default of Certain Contestees*, *infra*.

The marketability test of discovery is applicable to all minerals, including intrinsically valuable minerals.

Mining Claims: Discovery: Marketability

The fact that alumina, the raw material from which aluminum is produced, is present in the area of a group of mining claims does not satisfy the marketability test of discovery when there is no known process by which aluminum may be extracted from the particular alumina-bearing mineral compounds on a profitable basis.

Mining Claims: Location—Mining Claims: Placer Claims

Even though a placer mining claim is located by legal subdivisions on surveyed land, 43 CFR 3401.1 (1966) [now 43 CFR 3831.1] requires, in part, that the corners of the claim be staked and that a notice of location be posted thereon in order for such a location to be valid.

Administrative Procedure: Burden of Proof—Mining Claims: Contests—Mining Claims: Discovery: Generally—Rules of Practice: Evidence

A mining claimant is the proponent of the validity of his claim under the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* (1970), and has the burden of overcoming by a preponderance of evidence the Government's *prima facie* case of failure to comply with the location requirements of the mining law and of lack of discovery of a valuable mineral deposit.

Mining Claims: Contests

Despite the fact that the Government's witnesses were not present on each claim in contest, their testimony taken with the testimony of the principal contestee, called as part of the Government's case in chief, may be sufficient to establish a

prima facie case that the mining claims are invalid.

Mining Claims: Discovery—Mining Claims: Location—Rules of Practice: Evidence

Where a mining claimant's testimony as to location and discovery is superficial and implausible, it is reasonable for the Administrative Law Judge to conclude from the evidence and the testimony of other witnesses that none of the claims was located according to the requirements of the mining laws and that no discovery was made thereon.

Mining Claims: Contests—Rules of Practice: Government Contests

When a mining claimant has failed to answer a complaint in a mining contest, the allegations are deemed admitted under 43 CFR 4.450-7 and the Manager will decide the case without a hearing.

Mining Claims: Contests—Rules of Practice: Government Contests

When, pursuant to 43 CFR 4.450-7, a Manager has decided a mining contest against a defaulting contestee and no timely appeal was taken therefrom, a late appeal will be dismissed under 43 CFR 4.411(b).

Mining Claims: Contests—Rules of Practice: Government Contests

A defaulting contestee cannot rely on an answer filed by a co-claimant when such answer never purported to be on the defaulting contestee's behalf.

Mining Claims: Determination of Validity

The Department of the Interior has been granted plenary power in the administration of the public lands, and it has authority, after proper notice and upon adequate hearing, to determine the validity of an unpatented mining claim.

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Administrative Procedure: Generally—Constitutional Law—Mining Claims: Contests—Rules of Practice: Government Contests

A mining claimant is not denied due process merely because of prehearing publicity where he fails to show that there was any unfairness in the contest proceeding itself.

Administrative Procedure: Administrative Law Judges—Rules of Practice: Hearings

An Administrative Law Judge is not disqualified nor will his findings be set aside in a mining contest because of a mere charge of bias in the absence of a substantial showing of bias.

Administrative Practice—Administrative Procedure: Adjudication

The procedures followed by the Department of the Interior in the initiation, prosecution, hearing and administrative decision of mining contests are in full compliance with the requirement of the Administrative Procedure Act, 5 U.S.C. § 554 (1970), as to separation of investigative or prosecuting functions from decision making, and such procedures do not deny due process.

Administrative Procedure: Administrative Law Judges

No request for a prehearing conference having been made, the failure of an Administrative Law Judge to order a prehearing conference, *sua sponte*, is not error unless it can be shown that such failure was an abuse of discretion.

Administrative Procedure: Administrative Law Judges

The refusal of an Administrative Law Judge to grant a motion for severance is not a denial of due process when a mining claimant is afforded a hearing

and yet fails to present any evidence of unfairness because of such denial.

Federal Employees and Officers: Authority to Bind Government—Mining Claims: Generally

The authority of the Government to proceed with the determination of the validity of a mining claim is not barred by laches, because Government property is not to be disposed of contrary to law, despite any acquiescence, laches, or failure to act on the part of its officers or agents.

Mining Claims: Contests

The failure of the Government to contest other unpatented mining claims in a given area cannot support a charge of discrimination when a mining claimant fails to show that such action was arbitrary or prejudiced his rights in any way.

Rules of Practice: Hearings—Administrative Procedure: Hearings

Where an Administrative Law Judge's decision contains a ruling, in a single sentence, on all of the proposed findings and conclusions submitted by a party to a hearing and the ruling on each finding and conclusion is clear, there is no requirement that the Judge rule separately as to each of the proposed findings and conclusions.

Mining Claims: Hearings—Rules of Practice: Evidence—Rules of Practice: Hearings

Evidence tendered on appeal in a mining contest may not be considered except for the limited purpose of deciding whether a further hearing is warranted, since the record made at the hearing must be the sole basis for decision.

APPEARANCES: Clement Theodore Cooper, Esq., Washington, D.C.; Kenneth Kienzle, Jr., Esq., Shawnee,

Oklahoma; Edward L. Stolarun, Esq., Alexandria, Virginia, for appellants. Bryan L. Kepford, Esq., and George E. Longstreth, Esq., Office of the Solicitor, Department of the Interior, Denver, Colorado, for the Government.

OPINION BY MR. GOSS
INTERIOR BOARD OF LAND
APPEALS

The United States issued a complaint dated August 7, 1968 (amended April 25, 1969, and June 12, 1969), contesting the validity of 2,910 association placer mining claims located in Garfield, Moffat and Rio Blanco Counties, Colorado. The majority of claims were located in an area of Garfield and Rio Blanco Counties termed the Piceance Creek Basin. The complaint charged (1) the claims were not located in accordance with the mining laws³ and (2) there was no discovery of a valuable, locatable mineral deposit within the meaning of the mining laws within the limits of any of the claims.

The 2,910 mining claims contested in Colorado Contest 441 were all located by one man, Merle I. Zweifel. Zweifel, acting as locator and agent for over 250 co-locators, filed the vast majority of claims between May 2, 1966, and February 10, 1967. Most of the claims are 160-acre

association placer claims with eight co-locators.

A document was recorded with each claim group identifying the claims as "dawsonite claims;" however, at the hearing appellants asserted that the claims were actually located for alumina, the raw material from which aluminum is produced (Tr. 24, 771). Although the Piceance Creek Basin is widely known to contain extensive deposits of oil shale, none of the mining claims were located for such material. In any event, oil shale is not locatable under the general mining laws and has not been since it was made a leasable mineral by section 21 of the Mineral Leasing Act of February 25, 1920, *as amended*, 30 U.S.C. § 241 (1970).

Answers to the complaint were filed by a number of contestees. As to those contestees who failed to file answers, the Colorado Land Office Manager, Bureau of Land Management, on February 17, 1970, acting pursuant to 43 CFR 1852.1-7 (1970), now 43 CFR 4.450-7, declared their interests, if any, in the contested claims to be void.

A hearing was held June 2 through 5, and September 21 through 24, 1970, in Denver, Colorado. After post-hearing briefs were filed, oral argument was heard on June 4, 1971, in Arlington, Virginia.

Judge Luoma issued his decision on February 25, 1972. Attached thereto were a list of contestees, a list of the contested claims, the names of contestees represented by

³ At the hearing the elements of this charge were developed and the Government stated that appellants had failed to: (1) stake the claims, (2) go upon the land embraced by each claim, (3) post a location notice on each claim (Tr. 984-85). Attorneys for appellants acknowledged that they understood such to be the composition of the charge (Tr. 985-88).

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Clement Theodore Cooper, Esq., and a list of the claims which were located on patented or withdrawn lands (Attachments 1-4, respectively). The Judge declared that those claims or portions thereof which were filed on lands withdrawn for reclamation purposes by Public Land Order 2632, published in the Federal Register on March 17, 1962, were null and void ab initio. He also dismissed the complaint as to those claims or portions of claims which were filed on lands previously patented without mineral reservation (Exh. B-5). He declared all remaining claims null and void (1) because they were not located according to the mining laws and (2) for failure to show a discovery of a valuable mineral deposit on any of the claims.

Judge Luoma also determined it was not necessary to consider the question of whether aluminum, as part of the alumina in dawsonite, is locatable under the general mining laws or whether the mineral dawsonite in its entirety is only leasable under the Mineral Leasing Act of February 25, 1920, *as amended*, 30 U.S.C. § 261 (1970).

On appeal three attorneys representing various groups of appellants filed statements of reasons. Their substantive arguments are summarized as follows:

(1) The evidence adduced at the hearing clearly shows that appellants had a discovery of a valuable mineral deposit on each and every claim.

(2) Alumina is an intrinsically valuable mineral and as such a market is deemed to exist, and a claimant may

continue to develop his claim with a prospective anticipation of profit.

(3) Appellants proved the validity of each and every claim under the doctrine of known geological facts.

(4) Appellants were restrained from expanding and developing their surface discovery because to do so would have damaged the oil shale which is a leasable mineral and the property of the United States.

(5) Alumina, as found in dawsonite, gibbsite, nordstrandite, and analcite, is a locatable mineral within the meaning of the mining laws.

(6) Colorado state statutory location requirements were not applicable to the location of the claims involved in Colorado Contest 441, and location by legal subdivisions of government surveyed lands is sufficient to satisfy the mining laws.

(7) The Judge erred in refusing to grant appellants' motion to dismiss at the conclusion of the Government's case.

(8) The Government has the burden of proof in a mining claim contest.

(9) The Government failed to follow Departmental standards in examining the placer mining claims.

(10) The failure of some contestees to file answers to the complaint was not a ground for dismissal because such an alleged defect was cured by the answer filed by Merle I. Zweifel.

(11) Appellants were deprived of property without due process of law and without just compensation.

(12) Appellants could not receive a fair hearing because of adverse publicity and it was error not to grant appellants' motion to suspend the proceeding.

(13) The Judge was predisposed as to the outcome of the contest, and due to his relationship with the Department the rendition of a fair hearing and an unbiased decision were impossible.

(14) It was prejudicial error and an abuse of discretion for the Judge to refuse to direct a prehearing conference.

(15) Appellants were denied due process when the Judge refused to grant a

motion for severance and thereby hear and decide issues regarding each individual claim.

(16) Colorado Contest 441 was barred by laches.

(17) It was discriminatory for the Government not to proceed against other holders of unpatented mining claims in the Piceance Creek Basin.

(18) The Judge erred in failing to rule on all of appellants' proposed findings of fact and conclusions of law.

Discovery

In order for a mining claimant to establish the validity of one or more mining claims he must show the discovery of a valuable mineral deposit within the limits of each claim; therefore, a discovery on one claim cannot serve to validate a group of claims. *United States v. Bunkowski*, 5 IBLA 102, 79 I.D. 43, 51-2 (1972). The requirement of a discovery on each claim is admitted in the brief for certain appellants filed by Clement Theodore Cooper, Esq., on May 15, 1972, at page 47.

Appellants' arguments relating to discovery are:

- 1) The evidence adduced at the hearing clearly shows that appellants had a discovery of a valuable mineral deposit on each and every claim.
- 2) Alumina is an intrinsically valuable mineral and as such a market is deemed to exist, and a claimant may continue to develop his claim with a prospective anticipation of profit.
- 3) Appellants proved the validity of each and every claim under the doctrine of known geological facts.
- 4) Appellants were restrained from developing their discovery because to do so would have damaged the federally owned oil shale deposits.

The "prudent man rule" has been established by the Department as

the test for determining what constitutes a discovery of a valuable mineral deposit. This test was first laid down in *Castle v. Womble*, 19 L.D. 455, 457 (1894), in which the Secretary stated:

* * * [W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met. * * *

The Supreme Court has expressed its approval of the rule in a number of decisions. *United States v. Coleman*, 390 U.S. 599, 602 (1968); *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 335-36 (1963); *Chrisman v. Miller*, 197 U.S. 313, 322 (1905). Another test to complement the prudent man rule was approved in *Coleman, supra*. It is the so-called "marketability test." The Court said at pp. 602-03:

* * * Minerals which no prudent man will extract because there is no demand for them at a price higher than the cost of extraction and transportation are hardly economically valuable. Thus, profitability is an important consideration in applying the prudent-man test, and the marketability test which the Secretary has used here merely recognizes this fact.

The marketability test was explained further in *Barrows v. Hickel*, 447 F.2d 80 (9th Cir. 1971). The court felt present marketability was necessary. It stated at 83:

The "marketability test" requires claimed materials to possess value as of the time of their discovery. Locations based on speculation that there may at some future date be a market for the discovered material cannot be sustained.

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Thus it is not enough that a mineral deposit found within the limits of a claim may some day in the future, due to advancements in technology, become valuable. To satisfy the test, one must show that the minerals have a *present* value, and locations based on the speculation that improved mining and processing technology will make the mineral marketable in the future cannot be sustained. *United States v. Wurts*, 76 I.D. 6 (1969).

The lands herein involved were withdrawn from metalliferous location by Public Land Order 4522, 33 F.R. 14349, filed September 23, 1968. They were segregated from location and entry under the mining law when the Bureau of Land Management filed an application to withdraw on January 27, 1967. See 43 CFR 2351.3(a) and 43 CFR 2091.2-5(a). Therefore, for the claims to be valid, appellants must show a discovery on each claim prior to the date of the application for withdrawal. See *Udall v. Snyder*, 405 F.2d 1179 (10th Cir. 1968); *United States v. Wurts*, *supra*, at 9.

Appellants claim that they have made a discovery of alumina on each claim involved herein. Although alumina (Al_2O_3) is the source compound of aluminum metal, it does not occur freely in nature. It is found as a constituent oxide of other minerals (T. 634). In the Piceance Creek Basin where most of the subject claims lie, alumina is found most abundantly in a carbonate of aluminum and sodium ($\text{NaAl}(\text{OH})_2\text{CO}_3$) called dawson-

ite. Alumina is also found in gibbsite, nahcolite, and halite (Exh. C-5). Dawsonite and the other alumina-bearing mineral compounds are found mixed with kerogen-bearing dolomites termed "oil shales" in the Green River Formation which underlies most of the Piceance Creek Basin.

Appellants' belief that they have proved a discovery on each claim is based on the testimony of Merle I. Zweifel. Zweifel stated a number of times that he took surface samples from each and every claim (Tr. 247, 321, 736). The samples were never segregated as to individual claims and were merely thrown into the back of Zweifel's pickup truck for later identification (Tr. 230-32, 715-16). There were only about 20 assays performed on the 2,910 samples claimed to have been taken (Tr. 137-40). None of the assays could be identified to any particular claim, but only to claim groups (Tr. 140-44). The groups sometimes comprise 70 or 80 claims (Tr. 144).

The assay reports (Exh. B-70 through 78, 80, 81) are spectrographic analyses of oil shale samples. Generally they show 10 percent aluminum. John Ward Smith⁴ testified for contestant that spectrographic analysis is only semi-quantitative, and a 10 percent figure of aluminum content might actually be anything between 2 and 20 percent

⁴ Mr. Smith is a research chemist and project leader with the United States Bureau of Mines at the Laramie, Wyoming, Energy Research Center. The function of the Center is the study of oil production from oil shale (Tr. 510-11).

(Tr. 544). Edmund E. Phillips, a chemist-assayer who tested the samples and prepared the reports, believed the 10 percent analysis of aluminum content could represent somewhere between 7 and 15 percent, as outside limits (Tr. 894). The assay reports do not indicate in what form the aluminum is found or whether or not it would be recoverable (Tr. 550, 901). Even conceding that aluminum may be present throughout the oil shale, it may not be in a form which is extractable (Tr. 551). The assay reports are of no probative value in determining the existence of a discovery on any particular claim.

Appellants argue that alumina is an intrinsically valuable mineral and as such by its very nature meets the marketability test. Appellants cite as support for this proposition *Solicitor's Opinion*, 69 I.D. 145 (1962). At 146 the Solicitor stated:

An intrinsically valuable mineral by its very nature is deemed marketable, and therefore merely showing the nature of the mineral *usually* meets the test of marketability. * * * (Italics added.)

The inference to be drawn from the Solicitor's statement is not that an intrinsically valuable mineral need not meet the marketability test, but rather that the probability of such a mineral meeting the test is greater. The question of whether the marketability test is applicable to intrinsically valuable minerals was laid to rest in *Converse v. Udall*, 399 F.2d 616, 621 (9th Cir. 1968), *cert. den.*, 393 U.S. 1025 (1969), where the court stated that the mar-

ketability test, including the profit factor, was applicable to all mining claims including those containing precious metals.

The record clearly shows that appellants have failed to establish that alumina from any of their claims could be presently marketed at a profit.

At the hearing Smith testified that approximately 100,000 samples had been taken from 640 to 650 sample sites located throughout the Piceance Creek Basin. Of that number 98,000 to 99,000 have been analyzed by the Bureau of Mines and found to contain oil shale (Tr. 515-16). The non-hydrocarbon elements present in the oil shale samples resemble the elemental composition of the earth's crust and are present in very nearly the same proportion (Tr. 563). Despite the fact that aluminum constitutes roughly eight percent of the earth's crust (Tr. 593), only bauxite ore, in which alumina is concentrated by a weathering process, has qualified commercially as a source of aluminum. At present the majority of the bauxite ore used in the United States is imported from tropical countries (Tr. 564; Exh. C-3).

Smith testified that aluminum cannot be presently economically extracted and produced from any of the alumina-bearing compounds in the area of the claims (Tr. 619, 628, 640). He felt the investment necessary to commence and maintain commercial operation would continue to be, as it has been, a prohibitive factor (Tr. 646).

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Appellants assert that alumina is always found in oil shale and contend that each and every claim is valid under the doctrine of "known geological facts," citing *Freeman v. Summers*, 52 L.D. 201 (1927). The *Freeman* case involved the sufficiency of a discovery of oil shale on the surface and in shallow workings in the Green River Formation in Colorado. It was claimed that the formation consisted of one massive homogeneous deposit of oil shale which was capable of being commercially developed. It was also argued that oil shale found on the surface and in shallow workings on the formation was an integral part of the mass below and discovery of the surface shale was sufficient to satisfy the requirements of the law. In *Freeman* the Secretary held at 206:

While at the present time there has been no considerable production of oil from shales, due to the fact that abundant quantities of oil have been produced more cheaply from wells, there is no possible doubt of its value and of the fact that it constitutes an enormously valuable resource for future use by the American people.

* * * * *

The evidence in this case shows that in this particular area of Colorado the lands contain the Green River formation, and that this formation carries oil shales in large and valuable quantities; that while the beds vary in the richness of their content, the formation is one upon which the miner may rely as carrying oil shale which, while yielding at places comparatively small quantities of oil, in other places yields larger and richer quantities of this valuable mineral.

The Secretary then concluded:

In other words, having made his initial discovery at or near the surface, he may with assurance follow the formation through the lean to the richer beds.

Since *Freeman* was decided, the courts, e.g., *United States v. Coleman*, *supra*, and *Converse v. Udall*, *supra*, have approved the Department's refinement of the prudent-man test to include the requirement of a showing of present marketability. This Board has held that *Freeman* is not applicable to sand and gravel claims. *United States v. Clear Gravel Enterprises, Inc.*, 2 IBLA 285, 300 (1971). *Freeman* involved oil shale mining claims, and the precedential value of *Freeman* is now being considered by the Board in another appeal. As to the alumina claimed herein, it is clear that *Coleman* and *Converse* are controlling.

At the hearing Smith testified that he felt alumina could eventually be produced economically from dawsonite (Tr. 603, 639). However, at present there is no known process by which alumina may be produced from dawsonite-bearing oil shale on a commercial basis (Tr. 603, 620, 628).

Whether appellants' assertion that alumina is always found in oil shale is true is not the important issue; as Smith testified, the real question is what part of the alumina is economically extractable (Tr. 620). Appellants' witness, John Stevenson, stated that he did not have the expertise to testify as to whether reduction processes can be used economically (Tr. 820).

The evidence is not, therefore, that economically recoverable alumina exists in all oil shale or under all the contested claims. The evidence is that aluminum is an element universally present in the earth's crust. It is found in alumina-bearing compounds throughout the oil shale of the Piceance Creek Basin, but there is no evidence that all of such oil shale, or the shale which is on the claims concerned, contains economically recoverable alumina from which aluminum may be commercially extracted.

As to whether there has been a discovery of any other valuable minerals, Government witness Smith was asked, in connection with the analysis of the nearly 100,000 samples taken in the area of the claims, whether any of the elements in the samples (excluding aluminum, kerogen from oil shale and sodium) exist in sufficient quantities to be classified as a valuable mineral deposit. He responded that they did not (Tr. 563). According to section 21, *as amended* [43 U.S.C. § 241 (1970)], and section 23, *as amended* [43 U.S.C. § 261 (1970)], of the Mineral Leasing Act of February 25, 1920, oil shale and sodium, respectively, are subject to disposition only by leasing and, as such, are not locatable under the general mining laws. Therefore, the only mineral upon which appellants can be basing a discovery is alumina, the source compound of aluminum.

Appellants made no attempt to pinpoint any claim and assert that it contained economically extract-

able aluminum by showing reliable evidence as to the cost of extraction and marketing.

In arguing that they were restrained from developing their discovery, appellants cite a letter to Zweifel (Exh. C-97) dated December 13, 1966, from the Solicitor for the Department. Zweifel testified that he felt the letter restrained him from making any further development on the claims, other than surface sample operations (Tr. 951-52). The letter did not have the effect of a court order enjoining appellants from taking any further actions with respect to the claims; rather it merely informed Zweifel that if any action was taken which damaged the oil shale, the Government would then move to restrain such activity. The Solicitor further stated that development work which was not harmful to the oil shale could, of course, be performed. Appellants' argument that the letter restrained them from pursuing their discovery work is lacking in merit.

We, therefore, find that appellants have failed to prove a discovery of a valuable mineral deposit on any of their claims and for that reason their claims are null and void.

Alumina as a Locatable Mineral

Appellants' argument that alumina, as found in the alumina-bearing compounds commingled with leasable oil shale in the Piceance Creek Basin, is a locatable mineral within the meaning of the mining law need not be considered

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in light of the conclusions that have been reached above. Appellants have failed to prove a discovery on any of their claims.

Failure To Locate in Compliance With Mining Laws

Even if appellants had proved a discovery on each claim, appellants have not proved that any specific claim was located in compliance with the mining laws.

One of the two original charges in the complaint filed by the Government in Colorado Contest 441 was that the mining claims had not been located in accordance with the mining laws. Appellants argue that locating mining claims by legal subdivisions on surveyed land was sufficient to satisfy the federal mining law and that the requirements of Colorado state law need not be complied with.

The federal law governing location of mining claims is as follows:

30 U.S.C. § 22 (1970) provides, in part—

**** [A]ll valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, *** under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States. (Italics added.)*

30 U.S.C. § 28 (1970) provides, in part—

The miners of each mining district may make regulations not in conflict with the

*laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims made after May 10, 1872, shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. *** (Italics added.)*

Departmental regulation, 43 CFR 3401.1 (1966) [now 43 CFR 3831.1], provides, in part—

*Rights to mineral lands, owned by the United States, are initiated by prospecting for minerals thereon, and, upon the discovery of mineral, by locating the lands upon which such discovery has been made. A location is made by staking the corners of the claim, posting notice of location thereon and complying with the State laws, regarding the recording of the location in the county recorder's office, discovery work, etc. As supplemental to the United States mining laws there are State statutes relative to location, manner of recording of mining claims, etc., in the State, which should also be observed in the location of mining claims. *** (Italics added.)*

Appellants, citing *Reins v. Murray*, 22 L.D. 409, 411 (1896), and the instructions issued by the Department, *Location of Oil Shale Placer Claims*, 52 L.D. 631 (1929), argue that the Department does not require compliance with state or local regulations when placer mining claims are located by legal subdivisions on surveyed lands.

The 1929 instructions issued by the Assistant Secretary are limited. They refer to oil shale placer claims located *prior to February 25, 1920*, by legal subdivision on surveyed lands, without having the claim boundaries otherwise marked. The instructions stress the fact that particular mining claimants had relied on previous Departmental decisions. Under the instructions, the claims were to be considered valid as against the federal government within the meaning of section 37 of the Mineral Leasing Act,⁵ if they otherwise met the requirements of the section. In such case the Department would not inquire about the claimant's compliance with state or local regulations regarding marking of claims on the ground. Here, there was no reliance by appellants on prior Departmental decisions because Zweifel testified that he staked the corners of each of the claims herein (Tr. 188).

Reins involved the Departmental interpretation of Rev. Stat. § 2324, *as amended*, 30 U.S.C. § 28 (1970), and Rev. Stat. §§ 2329 and 2331, *as amended*, 30 U.S.C. § 35 (1970). The conclusion was that when placer claims are located by legal subdivision on surveyed land, it is

not necessary to mark the boundaries of the claim. *Reins* involved land in Montana and made no mention of state requirements. The events concerned therein occurred prior to promulgation of Departmental regulation 43 CFR 3401.1 (1966), now 43 CFR 3831.1, which requires staking the corners of the claim. We find that the Departmental regulation is controlling and that compliance therewith was required in the location of the mining claims, herein.

The procedure that was followed in locating the 2,910 claims was elicited from Merle I. Zweifel at the hearing. Zweifel testified that he initially went to the Rio Blanco County courthouse in Meeker, Colorado, and obtained a county map (Tr. 120; Exh. B-65). He described his location methods by testifying:

A. (The Witness) When I left the courthouse and had what I considered to be sufficient information to locate the claims, I went back out to the ground and I would examine, and I did examine, to determine that there were no other stakes or other claiming in the area, to the best of my ability. And then I would take the map which has been referred to as Exhibit 65 and I would — there are no county roads in the area, no section lines, and I would try to determine, and I did determine by the confluence of washes and streams shown on this map where I was, and to the existing roads in the area where they may have crossed a stream or intersected a stream or where there were any other pertinent — (Tr. 186.)

* * * * *

A. Then I would determine by the speedometer of the truck how far I had moved, and by those principal means I did locate these claims.

⁵ Section 37 of the Mineral Leasing Act of February 25, 1920, *as amended*, 30 U.S.C. § 193 (1970), reads:

Sec. 37. "The deposits of coal, phosphate, sodium, potassium, oil, oil shale, and gas, herein referred to, in lands valuable for such minerals, * * * shall be subject to disposition only in the form and manner provided in this chapter except as to valid claims existent on February 25, 1920, and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery."

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Q. At what point did you establish the legal description?

A. Well, I would take that map and where the rivers and the roads intersected, when I would come to that point I would determine on the map whether that was Section 1, 2, or 3, or the Southwest or the Northwest Quarter.

Q. Well now, if it was the northwest quarter and you were driving along the west section line, you locate the northwest quarter rather easily, couldn't you? (Tr. 187.)

A. I'm not sure it would be easy but by the stream patterns shown on the map I did locate them. (Tr. 188.)

* * * * *

Q. (By Mr. Longstreth) Mr. Zweifel, in going in through the area to locate these claims you obtained a map which showed roads; isn't that right?

A. Yes, sir; the existing roads.

Q. And you drove on those roads insofar as possible?

A. Yes, and sometimes there were trails that I would follow beyond the roads. (Tr. 241.)

* * * * *

Q. So in order to locate a claim some distance from the road you had to walk, didn't you?

A. No, no. In some instances you could drive out across the country up on—well—

Q. In all instances could you drive?

A. Not in all instances; no, sir.

Q. Did you see any fencing out there?

A. I do recall fences, yes. They were drift fences or Bureau of Land Management fences that were installed. I recall going through gates. (Tr. 242.)

Q. But now where you couldn't drive, Mr. Zweifel, how did you locate them?

A. We packed them where we couldn't drive.

Q. You mean you walked in?

A. Well, I wouldn't say walked in. We stopped the pickup and carried what we needed to go east, west, north, or south. (Tr. 243.)

* * * * *

In the early stages of the hearing Zweifel stated that he did not recall seeing any brass caps or rock monuments marking survey corners (Tr. 146). Yet at one point he testified that he had put stakes on the quarter corners of the claims (Tr. 188). Later he reversed himself stating that he did not stake or post the four corners of the claims (Tr. 221).

As to the posting of location notices Zweifel testified:

Q. And did you put up a location notice?

A. Yes, sir; I put up a notice.

Q. Where was that located?

A. Anywhere on that 160-acre claim. (Tr. 188.)

* * * * *

A. This is a copy of the notice I left on the claims.

Q. Well, didn't I understand you to say I believe yesterday or today that you prepared your location certificates after you located and sent them out to your principal locator?

A. We would make arrangements to locate these claims and we would mail a certificate out to the locator, and I would take a copy and place on the claim.

Q. Would that copy be identical to this as to names?

A. Well, yes, each copy; I'm not referring to—there were many claims and there were many different names on many different claim groups.

Q. Did you put up your notice by claim group?

A. On each claim, yes.

Q. If you had 20 claims you would have 20 notices?

A. That's correct, sir. (Tr. 190.)

* * * * *

Q. And now, the location certificate, certificate of location that you posted on the land didn't contain the names of all the locators, did they?

A. Yes, because I took them to Shawnee, that is correct. I took them to Shawnee and I had them drawn up, and when we posted the balance we would bring them back to the claim and post them on the claims. As you know, I made many trips back and forth to Colorado and I do this, I would do this work as I went to Colorado and beyond. (Tr. 191.)

* * * * *

A. * * * I would take these claims to the office and they were being prepared, and were prepared; they were mailed to our people, our co-locators, for their signature which they mailed directly to the county courthouse; and I would return then and place the location notices on the claim and do the sampling. (Tr. 192.)

* * * * *

Q. You mean the location certificates?

A. Right, copies of the certificates.

Q. Were those all executed?

A. They have always been executed at Shawnee and mailed to the co-locators for their signature. Then we would post a copy on the claim. (Tr. 193-94.)

Subsequently at the hearing Zweifel's testimony was contradicted by the testimony of Mrs. Jo Beamer, admission of which was stipulated (Tr. 828). Mrs. Beamer's evidence is that Zweifel would telephone the office in Shawnee, Oklahoma, while he was purportedly locating claims in Colorado; each time Zweifel called he would report the claims, descriptions, and co-locator names so she could prepare location certificates (Tr. 827-28).

Zweifel then testified that he spent the majority of his time in the field doing location work and that he telephoned the necessary information to his Shawnee office (Tr. 859-60). This testimony is at variance with his prior statements that

after scouting the available areas in the Piceance Creek Basin he would return to Shawnee, draw up the location notices, and return to Colorado to post them on the claims (Tr. 191-92; 202-03).

The Government presented the testimony of four Bureau of Land Management Area Resource Managers, Robert L. Kline, Stanley G. Colby, L. Duane Hillberry, and Carroll Leavitt, who administer the areas encompassing the claims.

Klein's area covers portions of the Agate, Nose, and Tag claim groups located in Garfield County. This area represents a very small part of the total area encompassed by the 2,910 claims in the contest (Tr. 328; Exh. B-6). Kline testified that he patrolled the area at least once a week in the summer but during the winter it was inaccessible (Tr. 337). He said he never observed any staking, nor any location notices, nor any evidence of mining in 1966, 1967 or 1968 (Tr. 338-39). The topography in the northern part of his area is very steep, with deep canyons and in some places rimrock escarpments (Tr. 330). The survey corners are marked by brass caps or rock monuments (Tr. 332). He stated that he did not believe one could accurately determine distance by the use of an odometer (Tr. 331).

Colby administers the largest part of the areas here involved, including all of the area covered by Exhibit B-6 other than that within Kline's area (Tr. 350). He travels various parts of the Piceance Creek Basin about every two or three weeks (Tr.

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352). He never observed any mining posts, stakes or notices that contained any reference to Zweifel or Zweifel International Prospectors (Tr. 353). The terrain is mountainous, ranging from steep canyons to foothills with a few escarpments in some places (Tr. 354). He traversed the Piceance Basin in 1966 and 1967 and observed no mining activity on any of the areas occupied by the claims (Tr. 356-57). He gave detailed testimony as to the roads that would have to be traveled and the routes necessary to set foot on the claims shown on Exhibit B-6 (Tr. 361-406). He stated that attempting to locate the governmental subdivisions strictly by use of a pickup truck odometer might result in mistakes. He attributed this to the curves and bends in the road and the general terrain itself (Tr. 360). It was also his opinion that given a pickup truck with an accurate odometer and the map used by Zweifel, he could not with accuracy stake the corners of the claims involved herein (Tr. 444).

Hillberry's and Leavitt's areas of responsibility lie in Moffat County, involving only a small part of the total claimed area (Exh. B-7). Both visited their areas frequently in 1966 and 1967. Hillberry observed no mining activity nor any mining location notices (Tr. 454-55). Leavitt found location notices posted in his areas but he found none of Zweifel's. In Hillberry's area the topography is ridges from moderate to moderately steep and the valleys are from moderate to gently slop-

ing. The access is good throughout (Tr. 455). The terrain in Leavitt's area is "fairly level, generally rolling sagebrush country, deep washes." (Tr. 465.)

Zweifel testified about certain photographs which purportedly depict his sampling and staking work in the Piceance Creek Basin (Exh. C-13 through C-70; Tr. 882). He said he was unable to identify the pictures of stakes to any particular claim (Tr. 879), but he did identify them to certain claim groups. A red figure on the back of each photograph represented a correspondingly numbered area on Exhibit B-6, at which place the photograph was allegedly taken (Tr. 884). On cross-examination Zweifel was asked:

Q. Now, upon which basis, sir, did you identify this Exhibit C-13 with a red 13? I think you testified you took it off of this plat?

A. This is correct.

Q. How did you get the figure 13 to put on the plat?

A. Well, we just laid the pictures out and I identified where I had been doing my stake work.

Q. All you had to look at was the picture?

A. That is correct.

Q. Are you intending to testify under oath by looking at that piece of ground you can tell exactly where it was?

A. Yes, I do.

Q. It that true of all these other pictures?

A. Yes, that is true. (Tr. 970-71.)

The fact that Zweifel could remember the location at which these photographs were taken and identify them to a claim group is unusual in light of his lack of ability

to recall other facets of his location procedure (Tr. 122, 140, 192, 221, 243-44, 859). In addition, when asked at the hearing to identify three sets of photographs, Exhibits B-66, B-67, and B-68, Zweifel replied:

A. I hesitate to state at this late stage. This has been four years, and I hesitate to attempt to identify it. I staked a number of claims and we are not going to get tangled up in a little thing like that. We have several thousand pictures. (Tr. 128.)

Q. Do you recognize these pictures?

A. I doubt if I could pick them out among thousands of pictures we have taken. I probably could, but I am not going to take a chance at it. I will put it like that. I have several thousand others and they all look almost the same. It is not a requirement of mining law to take pictures. We do that as an added precaution, as you know. (Tr. 129.)

The photographs (Exh. C-13 through C-70) are completely lacking in probative value. They do not support the contention that the claims were located in accordance with the mining law. They substantiate only the fact that they were taken.

At the hearing Zweifel was questioned as to the possibility of locating the same land twice. He replied:

A. No, I don't think there is that possibility there. It might have occurred but I don't recall of knowing of the circumstances of that nature.

Q. If you are really careful it probably wouldn't happen, is that right?

A. I think it wouldn't happen. (Tr. 128.)

Zweifel also stated that he checked the lands prior to locating and saw no indication of other staking (Tr. 290). When confronted

with the fact that he had top filed in more than 200 separate instances (Exh. B-92), Zweifel had no explanation (Tr. 313).

Zweifel testified that he located all the claims in contest without any assistance (Tr. 714). Yet between May 2 and May 23, 1966, Exhibits B-1 and B-2 show Zweifel purportedly located a total of 2063 claims in Colorado covering over 287,000 acres of land. On May 15, 1966, at the same time that Zweifel filed location notices for 497 mining claims in Rio Blanco County, Colorado (Exh. B-1 and B-2), he also filed location notices for 73 mining claims in Sweetwater County, Wyoming (Tr. 534, Exh. B-100).

The record reveals the impossibility of the task purportedly undertaken by Zweifel. Judge Luoma concluded at page 27 of his decision:

It is obvious from Mr. Zweifel's own testimony and pictures that his efforts, in addition to filing claim notices in the courthouse, were basically directed at posting notices or identification markers, on groups of claims, not on individual claims. He made no effort to establish individual claim corner monuments nor to ascertain whether the individual claims were in fact monumented by the public land surveys. In fact, an exercise in simple arithmetic would reveal the impossibility of a person's being able to set foot and post a notice on each one of the numerous claims within the time limitations fixed by Mr. Zweifel's activities. Furthermore, it defies belief that a person could find his way to each and every claim, considering the nature of the terrain and roads, the lack of fence lines, the disregard of survey monuments, and the navigational tools utilized by Mr. Zweifel. The finding is inescapable that Mr. Zweifel did not and could not post a claim

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notice on each and every claim so as to serve notice on the world that the land embraced thereby was under claim. * * *

Although we realize that Zweifel could have properly staked, posted notice upon and located some of the claims in contest, the burden rests with appellants to establish which of the claims, if any, were properly located. This burden appellants have not met.

Appellants failed to comply with the federal mining law in the location of their 2,910 placer mining claims. Therefore, the claims are invalid.

Burden of Proof

In arguing that the Government has the burden of proof in a mining contest, appellants are incorrect as to the law. It is well settled that in a mining contest the Government has the burden of establishing a prima facie case that the mining claim is invalid. The claimant then must prove by a preponderance of evidence that his claim is valid. *Foster v. Seaton*, 271 F.2d 836 (D.C. Cir. 1959). Appellants contend that such a rule has developed only because of a misinterpretation of the *Foster* holding. The rule, however, has been consistently followed by the Department, *United States v. Harper*, 8 IBLA 357 (1972); *United States v. Taylor*, 8 IBLA 264 (1972); *United States v. Bass*, 6 IBLA 113 (1972), and by the courts, *Converse v. Udall*, *supra*; *United States v. Toole*, 224 F. Supp. 440 (1963).

Appellants charge that the Government did not follow Departmental standards for the examination of placer mining claims. Appellants overlook the fact that such standards are merely general guidelines and do not have the force and effect of statutes or regulations. There is no requirement that such guidelines be followed. Whether or not they were followed is not the essential issue. It is, rather, whether or not the Government established a prima facie case that the claims are invalid.

In the proper circumstances the Government may establish a prima facie case even though its witnesses were not physically present on the mining claims. *United States v. Fischer Contracting Co., John T. Katsenes, Intervenor*, A-28779 (August 21, 1962). Government witnesses herein testified, as set forth *supra*, that they were familiar with the subject area; that 98,000 to 99,000 oil shale samples had been taken in the area of the claims; that such samples had been analyzed to determine the minerals present; and that although alumina-bearing compounds were found, there was no known present process by which aluminum could be extracted from such compounds and marketed at a profit. Even though the Government witnesses were not physically present on each claim, their testimony, coupled with the testimony of Zweifel, is sufficient to establish the Government's prima facie case.

As part of the prima facie case, the Government called Zweifel as

an adverse witness. Zweifel was asked to state under oath what he did to locate the claims (Tr. 120, 145, 186-213, 240) and to discover a valuable mineral deposit on each claim (Tr. 144, 226, 231, 247, 715, 735-37). Zweifel's testimony as to location was so superficial and so implausible that it was reasonable for the Judge to conclude from that testimony and the testimony of other witnesses, that none of the claims were located according to the requirements of the mining law. *See Adair v. Shallenberger*, 119 F.2d 1017, 1019 (7th Cir. 1941).

As to discovery, Zweifel is not an experienced assayer, metallurgist, chemist, engineer or surveyor. (Tr. 117, 246.) He testified that he had taken surface samples from every claim, but that none were identified to any particular claim (Tr. 715). Only approximately 20 of the samples were assayed. None of the assays could be related to any specific claim and none of the assays showed the existence of any valuable minerals which could be extracted and marketed at a profit. Again, considering the inherent implausibility of the Zweifel testimony concerning discovery, it was reasonable for the Judge to conclude from such testimony and the testimony of the Government witnesses that there was no discovery of an economically recoverable mineral on any of the claims herein.

We find that the Government presented a prima facie case on both allegations in the complaint. The Government's prima facie case having

been established, appellants had the responsibility of proving that the claims were located according to the mining law and that there was a discovery of a valuable mineral deposit on each claim. Appellants have failed to produce persuasive evidence that any claim was located properly or that there was a discovery on any claim.

Default of Certain Contestees

Appellants contend that the failure of some contestees to file answers to the complaint was cured by the answer as filed by Zweifel. The contestees against whom the judgment was rendered may not rely upon the answer filed by Zweifel, as his answer never purported to be on their behalf. *United States v. Holcomb*, A-31019 (August 21, 1969).

The rules of practice of the Department governing procedures in contest proceedings provide that, within 30 days after service of the complaint a contestee must file in the office where the contest is pending an answer specifically meeting and responding to the allegations of the complaint. 43 CFR 4.450-6. The rules provide further that:

If an answer is not filed as required, the allegations of the complaint will be taken as admitted by the contestee and the Manager will decide the case without a hearing. 43 CFR 4.450-7(a).

On February 17, 1970, acting pursuant to the rules, the Colorado Land Office Manager issued a decision declaring the interests in the mining claims of the defaulting con-

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testees named therein null and void for failure to answer the charges of the complaint. The only appeal taken from that decision was by John C. Sterge, a named contestee, which appeal related to additional interests acquired by him in the King Midas claims 1-7 and Westwood claims 1-7. Sterge also owned other claims and filed a timely answer. That answer is deemed to relate to all claims in which he had an interest, and his appeal herein is likewise deemed to encompass his interest in all such claims. The separate appeal is therefore moot.

No other defaulting contestee appealed the Land Office Manager's decision. As to those contestees, the allegations in the complaint were deemed admitted and the decision of the Manager was proper. No timely appeal having been taken therefrom, the contest against the defaulting contestees is considered to be closed.

In the Notice of Appeal filed in the present case by Kenneth Kienzle, Jr., such notice purports to be on behalf of "the contestees in Colorado Contest 441." As to defaulting contestees who did not file a timely appeal from the February 17, 1970, decision, the present appeal is dismissed pursuant to 43 CFR 4.411(b).

Due Process

Appellants' assertion that they were deprived of property without due process of law and without just compensation is without merit. Due process requires notice and oppor-

tunity for hearing. As to mining claims, it does not require that the hearing be held in the courts or forbid inquiry and determination by the Department. *Best v. Humboldt Placer Mining Co.*, *supra*, at 338. Until the issuance of a patent, the legal title to a mining claim remains with the United States Government and the Department is empowered, after proper notice and adequate hearing, to determine the validity of the claim. *Davis v. Nelson*, 329 F.2d 840, 846 (9th Cir. 1964); *Cameron v. United States*, 252 U.S. 450, 459-60 (1920).

Appellants argue that they did not receive a fair hearing. They allege that there was sufficient adverse publicity surrounding the contest proceeding so as to render a fair hearing impossible. They also charge that they were denied due process because of the bias and predisposition of the Administrative Law Judge and other Department of the Interior employees. They argue that such individuals should have been disqualified from participating in the adjudicatory proceedings.

Appellants who were represented by Clement Theodore Cooper, Esq., made these same arguments in motions to disqualify and suspend the proceedings before the hearing. The Administrative Law Judge denied the motions by order dated May 13, 1970. Mr. Cooper renewed the motions at the hearing (Tr. 6-7).

Appellants contend that before the contest proceeding the Depart-

ment of the Interior issued a number of statements to the news media implying that judgment had already been passed on the validity of the claims. Although, appellants have made general allegations of adverse prehearing publicity, they have failed to present any persuasive evidence that there was any unfairness in the contest proceeding itself. See *United States v. Gunn*, 7 IBLA 237, 246, 79 I.D. 588, 592 (1972).

Appellants grounded their motion for disqualification on the concept that an Administrative Law Judge is an "employee" of the Department of the Interior and therefore subject to Departmental control. The relationship itself does not prove that the hearing was unfair or lacking in due process. *United States v. Gunn*, *supra*. In order to disqualify an Administrative Law Judge or justify a ruling that the hearing was unfair upon a charge of bias, there must be a substantial showing of bias. *Converse v. Udall*, *supra*; *United States ex rel. DeLuca v. O'Rourke*, 213 F.2d 759, 763 (8th Cir. 1954); *United States v. Cody*, 1 IBLA 92 (1970). In addition, the Departmental procedure in initiating, prosecuting and deciding mining contests does not violate that section of the Administrative Procedure Act, 5 U.S.C. § 554 (1970), which requires the separation of the investigative or prosecuting functions from those of decision making. *United States v. Augeris*, 8 IBLA 316, 322 (1972); *United States v. Mullin*, 2 IBLA

133, 139 (1971); *United States v. Melluzzo*, 76 I.D. 160, 180-81 (1969).

Clearly, appellants were not denied due process nor can we find support in the record for appellants' allegations that adverse publicity and bias rendered a fair hearing impossible. The Judge did not err in denying appellants' motions to disqualify himself and to suspend the proceedings.

Prehearing Conference

Appellants also maintain that the failure of the Judge to direct a prehearing conference was prejudicial error and an abuse of discretion. Under 43 CFR 4.430, the Administrative Law Judge may *in his own discretion*, on his own motion or motion of one of the parties, direct that a prehearing conference be held. The regulation clearly states that the decision of whether or not to hold a prehearing conference is discretionary with the Administrative Law Judge. In the present case, appellants did not make a motion to hold a prehearing conference, yet they assert that the failure of the Judge to order such a conference on his own motion was an abuse of discretion.

To constitute an abuse of discretion the action must be arbitrary, fanciful, or clearly unreasonable. *United States v. McWilliams*, 163 F.2d 695, 697 (D.C. Cir. 1947). Appellants present no evidence that the failure to order a conference by Judge Luoma was arbitrary or clearly unreasonable. In addition, while the issues were being framed

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at the hearing (Tr. 23-29), Clement Theodore Cooper, Esq., stated that he considered the hearing at that juncture to be a small pre-trial conference (Tr. 27).

Having been afforded the opportunity to handle such matters at the hearing, appellants cannot be heard to complain that the lack of a pre-hearing conference was prejudicial error.

Severance

Appellants, prior to the hearing, filed a motion for severance. By order dated May 25, 1970, Judge Luoma denied the motion. Appellants renewed the motion at the hearing (Tr. 27). Appellants argue that the failure to grant such motion was a denial of due process because it was virtually impossible to hear and receive evidence as to each individual claim. Such an argument is merely the statement of an unsupported conclusion. Appellants present no evidence of unfairness of the hearing based on the large number of claims involved herein. Appellants were afforded the opportunity to present evidence concerning each claim at the hearing, yet they failed to present any probative evidence in regard to any individual claim.

Laches

Appellants argue that the Government should have acted by injunction, ejectment, or withdrawal of the lands when it had actual knowledge that vast numbers of location notices were being filed for areas in the Piceance Creek Basin and that failure to do so precluded

the later contest proceeding. The argument cannot be sustained.

Colorado Contest 441 was not barred by the doctrine of laches. By statute, 43 U.S.C. § 2 (1970), the Secretary of the Interior has been granted plenary authority to administer the public domain. Inherent in such authority is the duty to see that valid mining claims are recognized, invalid ones eliminated, and the rights of the public preserved. *Cameron v. United States*, *supra*.

The general rule is that laches or neglect of duty by the officers of the Government is no defense to a suit by the Government to protect the public interest or preserve a public right. 43 CFR 1810.3(a); *United States v. California*, 332 U.S. 19, 39-40 (1947); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917).

Until mining claims are patented they are not immune from attack, and the Government, as the holder of legal title, may contest the validity of such at any time. *United States v. Ideal Cement Company, Inc.*, 5 IBLA 235, 79 I.D. 117, 120 (1972). Appellants have provided no evidence that the delay from February 10, 1967, when the last location notices were filed until August 1968 when the complaint was issued, has prejudiced their rights in any way.

Given the above, there is no need to explore appellants' argument involving the question of whether the Secretary of the Interior's administration of the public lands is the

exercise of a governmental or proprietary function.

Other Unpatented Claims

Appellants' argument that the contest was discriminatory because the Government did not join, herein, other persons holding interests in unpatented mining claims in the Piceance Creek Basin also lacks merit. It would be unreasonable to require that all such individuals and corporations be joined as parties in Colorado Contest 441. Colorado Contest 441 had a common thread which made logical the contest of 2,910 claims involving numerous contestees. The thread was that all the claims herein were allegedly located by Merle I. Zweifel. He had personal knowledge of the procedures followed in the location of all the claims involved in the contest.

Appellants have made assertions of discrimination, but have provided no substantive evidence to advance such a charge. In order for appellants' assertions to stand they must show that the Government acted arbitrarily by not joining other persons—not Zweifel's co-locators—who held interests in unpatented mining claims in the Piceance Creek Basin. Merely because such claimants were not joined does not support appellants' charge of discrimination.

Findings and Conclusions

The action of Judge Luoma in rejecting appellants' proposed findings of fact and conclusions of law was not an abuse of discretion. According to 43 CFR 4.452-8(b), the Administrative Law Judge may

adopt the findings and conclusions proposed by one or more of the parties to a hearing. The regulation allows the Judge to exercise his discretion in accepting or rejecting the findings and conclusions.

Appellants also charge error because the Judge did not make a ruling on each and every finding and conclusion as required by 43 CFR 4.452-8(b). However, the Department and the courts, have held that where an Administrative Law Judge rules, in a single sentence, on all of the proposed findings and conclusions submitted by a contestee, and the ruling on each finding and conclusion is clear, it is not necessary that the Judge make a separate ruling on each finding and conclusion. *National Labor Relations Board v. Sharples Chemicals, Inc.*, 209 F.2d 645, 652 (6th Cir. 1954); *United States v. Chas. Pfizer & Co., Inc.*, 76 I.D. 331, 352 (1969); *United States v. Driear*, 70 I.D. 10, 11 (1963).

Such is the case herein, as Judge Luoma stated in his decision:

The proposed findings of fact and conclusions of law submitted by Contestees have been considered and, except to the extent that they have been expressly or impliedly affirmed in this decision, they are rejected on the grounds that they are, in whole or in part, contrary to the facts and law or because they are immaterial.

New Evidence

Appellants have also submitted with their appeal additional evidentiary material. Such material may not be considered or relied upon in reaching a final decision. The record

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made at the hearing constitutes the sole basis for decision except to the extent that official notice may be taken of the public records of the Department of the Interior and of any matter of which the courts may take judicial notice. 43 CFR 4.24. Such a tender of evidence may only be considered for the limited purpose of deciding whether a further hearing is warranted. *United States v. Gunn, supra; United States v. Winters*, 2 IBLA 329, 78 I.D. 193 (1971). The evidence submitted in this case does not justify such a further hearing.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

JOSEPH W. GOSS, *Member*.

WE CONCUR:

FREDERICK FISHMAN, *Member*.

DOUGLAS E. HENRIQUES, *Member*.

H. W. CALDWELL AND SON, INC.

IBCA-824-2-70

Decided May 30, 1973

Contract No. NPS-WASO-NATR-V-63/28, Natchez Trace Parkway Project 3-0-7, National Park Service.

Sustained in Part.

Contracts: Construction and Operation: Drawings and Specifications—
Contracts: Construction and Operation: General Rules of Construction

While Federal custom ordinarily prevails over local usage when in conflict, in resolving a dispute concerning the reasonableness of tolerances permitted under a contract for the construction of a road, state and not Federal custom is held to govern, since the evidence showed state usage to be standardized and the Federal trade practice was not clearly established.

Rules of Practice: Appeals: Burden of Proof—Rules of Practice: Evidence

A contractor under a contract for the construction of a road has not sustained its burden of proof where the only evidence offered by it in support of a particular claim is the testimony of one witness who repeated the allegations contained in the contractor's original claim letter, as such assertions have no probative weight in the absence of further amplification and documentation.

Contracts: Construction and Operation: Changed Conditions—Contracts: Construction and Operation: Drawings and Specifications

Where a contract for the construction of a road provided for the placement of underdrain, estimated at 3000 linear feet, a claim by a contractor under the Changed Conditions clause upon encountering water seepage, which necessitated less than 3000 linear feet of underdrain to be placed, was denied, since the presence of a wet condition should have been reasonably anticipated from a study of the contractual documents and the amount of wetness encountered was actually less than the contractor might have expected.

APPEARANCES: Robert B. Ansley, Jr., Attorney at Law, Smith, Currie & Hancock, Atlanta, Georgia, for the appellant; Justin P. Patterson, Department Counsel, Washington, D.C., for the Government.

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APPEARANCES: Robert B. Ansley, Jr., Attorney at Law, Smith, Currie & Hancock, Atlanta, Georgia, for the appellant; Justin P. Patterson, Department Counsel, Washington, D.C., for the Government.

OPINION BY MR. PACKWOOD
INTERIOR BOARD OF
CONTRACT APPEALS

On October 2, 1963, the National Park Service awarded Contract No. NPS-WASO-NATR-V-63/28 to H. W. Caldwell & Son, Inc. (appellant), in the estimated amount of \$1,816,424.15 for Project 3-0-7, Natchez Trace Parkway, in Madison County, Mississippi. The contract called for grading, drainage structures, special borrow plating, selected borrow topping, aggregate base, bituminous concrete pavement and other work for the construction of 8.561 miles of the Parkway, beginning near Ridgeland, Mississippi, and ending 3.7 miles south of Mississippi Highway 43.

This project was a relocation of the existing parkway, made necessary by the action of the Pearl River Reservoir Commission in developing the Ross Barnett Reservoir which was scheduled to flood some sections of the existing parkway. The contract was prepared on standard forms for construction and contained the General Provisions set forth in Standard Form 23-A (April 1961 Edition), as well as seventeen pages of special provisions. The contract also incorporated by reference the provisions of Standard Specifications for Construction of Roads and Bridges on Federal Highway Projects, FP-61 (January 1961), U.S. Department of Commerce, Bureau of Public Roads.

The contracting officer terminated the contract for default by letter of

March 1, 1967, which advised the contractor that as of January 15, 1967, the contract work was estimated to be 63 percent complete, while the time authorized was overrun by four calendar days. The letter recited that failure to prosecute the work with such diligence as to insure completion within the authorized time constituted a default on the part of the contractor and justified termination of the contract by the Government. The contractor's right to proceed with the work was therefore terminated.

After completion of the project by another contractor, Caldwell submitted claims for equitable adjustments of its contract by brief of June 28, 1968. The brief set forth 19 separate claims, designated by the letters "A" through "S" and alleged that

* * * the contractor encountered extra work, changes, changed condition, excusable and Government-caused delays, and interference by the Government with the Contractor's planned methods of performance which, in effect, took the control over the project work away from the Contractor.

The Findings of Fact and Decision of the Contracting Officer, dated January 6, 1970, denied all claims except for minor portions of Claims E and S. Additional compensation of \$2,607 and 18 days extension of the contract time were allowed under Claim E. Credit for the cost of culvert pipe and reinforcing steel taken over by the Government and for unpaid earnings at the time of default were allowed under Claim S. The Contracting Of-

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ficer further found that there were increased construction costs of \$257,094.24 on the completion contract, additional engineering costs of \$1,847.58 and liquidated damages of \$38,800 chargeable to Caldwell. After crediting Caldwell with the allowances under Claims E and S, the Contracting Officer found the total amount due the Government to be \$149,662.46.

After giving timely notice of appeal of the Contracting Officer's decision, the appellant filed its complaint, restating its claims "A" through "S", asking for an equitable adjustment in the form of an extension of the contract time by 261 days, and alleging the reasonable value of all the work performed by the appellant under the contract was \$3,947,425.70. After deducting the sum of \$1,067,681.69, which the Government had paid, the appellant requested an equitable adjustment of the contract in the amount of \$2,879,744.01. Appellant further alleged that the Government wrongfully terminated its right to proceed and therefore it denied responsibility for excess costs involved in the procurement as well as for the liquidated damages assessed by the Government.

In response to the July 2, 1970, Order of this Board granting the Government's motion for a more definite statement of the complaint, the appellant submitted an itemized breakdown of costs totaling \$4,714,337.48 and asserted that the most suitable method of providing

an equitable adjustment was to utilize the total cost method. After deducting the payments made by the Government, the appellant's amended complaint requested a net equitable adjustment in the amount of \$3,646,655.79, together with such other costs as may be incurred after July 31, 1970 for which the contractor may be entitled to recover.

An extended hearing was held on this appeal, running from April 5 to May 3, 1971, in Jackson, Mississippi, and from June 1, to June 11, 1971, in Arlington, Virginia. The hearing produced a transcript totaling 4,484 pages in 15 volumes. The parties introduced more than 140 exhibits, many of them multi-paged. The appeal file consists of more than 800 pages in two volumes.

The individual elements of the claim, which appellant designated "A" through "S" will be referred to by the same designations in this opinion. These separate elements will be examined in the order listed before we consider the overall claims for equitable adjustment, the propriety of the default termination and the Government's related claim for excess costs, as well as the liquidated damages assessed for delayed performance.

By agreement of the parties, the hearing on this appeal was limited to the question of liability, reserving the issue of quantum for reference to the contracting officer in the event that additional liability was found to exist.

Claim A

The appellant alleges in its complaint that the Government required unreasonable tolerances of one inch and later three inches in undercut areas and in corresponding elevations in fills, causing extra work for which it is entitled to an equitable adjustment (Complaint, par. 2A). In its claim brief of June 28, 1968, to the contracting officer, the appellant had also alleged that the time required to set blue top stakes and check the grade with a string line caused the material to be exposed to the elements for long periods of time and made it difficult to achieve the close tolerance required by the Government.

The evidence introduced by the appellant to support this portion of its claim consisted primarily of a repetition of the allegations in the claim brief by Mr. Edward Caldwell, Executive Vice President of the appellant firm. Mr. Caldwell first defined undercut as removal of unsuitable material from a roadway to make a space to put more suitable material back (Tr. 721, 722) then expanded his definition to include any excavation below the top of the road grade or planned profile (Tr. 722). Although he observed that the term undercut was used in only one instance in the plans, the note at page 7, Mr. Caldwell interpreted the information set forth on page 2 and page 4 of the plans as requiring undercutting.

Mr. Caldwell asserted that in 30 years of experience in grading construction in Tennessee, Kentucky,

Alabama and Mississippi, he had never known of a situation where blue top stakes were placed at the bottom of an undercut for use in string line checking of the grade (Tr. 748). Mr. Caldwell objected to imposition of tolerances at the bottom of undercut areas as contrary to established practice in the industry.

Mr. Caldwell's objection to the application of a one-inch tolerance at the bottom of the excavation in cuts and at the corresponding elevation in fills led to a conference on April 20, 1966, with Regional Engineer G. A. Wilkins, District Engineer Roderick S. Banks and Resident Engineer Oscar Grant. As a result of the conference, the Government relaxed the tolerance from 1 inch to 3 inches, but the resident engineer continued to set blue top stakes and to use string lines to check the 3-inch tolerance. Mr. Caldwell continued to object, insisting that it was not customary practice to impose tolerances at the bottom of undercut areas by means of blue tops and string lining.

In support of Mr. Caldwell's assertions as to custom and usage with respect to tolerances in undercut areas, the appellant introduced a number of photographs of undercut areas on the completion contract for the purpose of showing that the Government reverted to normal procedures and did not require blue topping and string lining at the bottom of such areas (App. Exhibits 3(a) through 3(ccc)).

Mr. Roderick S. Banks, District Engineer, defined undercutting as

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any excavation below the grade line (Tr. 1926), but he stated that when there is a specified depth of undercut, that is a portion of the design (Tr. 1918). Controls were applied when the undercut was part of the design, but not when it was merely removal of soft or unsuitable material found in the road during construction. Mr. Banks testified that responsibility for determining the tolerances to be applied rested with his Resident Engineer on the project, Mr. Grant. Although he did not set the tolerances initially imposed, he considered them reasonable and opposed relaxation of those tolerances at the conference on April 20, 1966.

Mr. Grant defined the undercutting generally referred to in construction as the removal of unsuitable material described in Article 102-3.9, Standard Specifications FP-61 (Tr. 2145). In layman's terms, Mr. Grant described this operation as removal of soft spots in the road until stable material is located, then, without dressing to any special line or grade, backfilling with unclassified excavation or borrow. This type of operation was performed in several places on Project 3-0-7 (Tr. 2147). On the other hand, Mr. Grant did not consider excavation for the 2'4" layer of plating material to be undercutting since the cross sections showed every station where such plating was superimposed on the subgrade.

Mr. Grant testified that he had supervised 10 large grading jobs involving 65-70 miles of the Natchez

Trace Parkway in the years immediately prior to October 1963, and had never even had a serious discussion with any other contractor concerning tolerances (Tr. 2110). On those projects, he applied $\frac{1}{4}$ -inch tolerance at the top of the topping, $\frac{1}{4}$ -inch at the top of the base, $\frac{1}{8}$ -inch at the top of the pavement and $\frac{1}{8}$ -inch on bridge decks (Tr. 2111). The pavement structure on these projects was normally 20 inches thick, consisting of one foot of topping and eight inches of base. On Project 3-0-7, however, the typical pavement structure was four feet thick, having a 2'4" layer of plating below the topping and above the subgrade. Since he considered the drainage and load distribution to be less critical at a distance of four feet below the profile grade, Mr. Grant determined that a one-inch tolerance would be more reasonable than the $\frac{1}{4}$ -inch tolerance he normally applied at the top of the subgrade.

The Government presented testimony from an experienced engineer, who was not involved in the present dispute, on the question of custom and usage in grading construction in appellant's home state of Tennessee. Mr. Garland Ryals Champion, Highway Operations Engineer and Supervisor of the Department of Construction, Maintenance, Secondary Roads and Traffic Engineering in the Tennessee Department of Highways (Govt. Exhibit DD), who had 40 years' experience with the Tennessee Department testified that when he assumed the position

of State Construction Engineer in 1961, he sought to standardize the tolerances applied on road-building projects throughout the state. Allowable tolerances were the subject of letters of June 15, 1961 (Govt. Exhibit EE) and January 6, 1965 (Govt. Exhibit FF), from the Department of Highways to the engineers on construction. These letters set forth the allowable tolerance for grading on both primary and secondary roads as 0.10 foot. Mr. Champion stated that grading in this context means excavation only, making cuts and fills to the elevation called for in the plans (Tr. 2166). The sub-grade elevation and the top of the grading are the same thing (Tr. 2167). Engineers on construction were instructed in both letters to set blue tops for grading on all jobs and also to use the blue tops or reset them for capping on primary roads. Mr. Champion testified that string lining from the blue tops was a customary method of checking the grade. If center blue tops are set, the string line is used to establish the outside grade and if blue tops are set on both sides, a string line would be used to check the crown (Tr. 2181).

Mr. Champion expressed his opinion that if a road design in Tennessee called for a layer of special material 2'4" below the capping, the same tolerance should apply at the bottom of the layer as if no special material were added, $\frac{1}{10}$ of a foot (Tr. 2176-77). According to Mr. Champion, both cuts and fills should be blue topped to control

the thickness of the special material in order to determine how much of the material should be paid for (Tr. 2177).

When asked on cross examination what tolerance he would apply to the bottom of an undercut, Mr. Champion stated that undercut in Tennessee means removal of soft or bad material and replacing it with better material (Tr. 2185). Undercut is not designated by station number on the plans since where it will develop cannot be determined in advance. He noted, however, that the terminology was different on the Natchez Trace, since the plans designated undercut to a particular thickness (Tr. 2186).

Mr. Russell H. Giles, Field Superintendent for the appellant from April to December 1965 (Tr. 2995), who had worked on construction since 1928, drew a distinction between spot undercut for removal of soft material which is not graded to any specific level (Tr. 3008-09), and roadway undercut for base material (Tr. 3008) or linear grading undercut (Tr. 3014-15) which was part of the rough grading. Mr. Giles stated that a tolerance of .1 to .2 foot up or down was reasonable for such rough grading.

Decision

This claim for extra work rests entirely on the question of the reasonableness of the one-inch tolerance applied before the conference on April 20, 1966, and the three-inch tolerance applied thereafter. No tolerances are specified in the plans

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for the level of construction to which these tolerances of one and three inches were applied. While trade practices cannot be relied upon to vary the terms of an unambiguous contract provision, it has been held that imposition on a contractor of tolerances not set forth in a contract and in excess of those normally employed on jobs of a similar character is an unwarranted interference in the performance of the contract, entitling the contractor to an equitable adjustment of the contract.¹

Before determining the tolerances normally employed on jobs of similar character we must first establish the character of this job. The level at which the tolerances of one inch and three inches were applied is the bottom of the 2'4" layer of plating, but the parties use different terms in relation to this level. The appellant refers to the operation required to reach such level in cuts as undercut, while the Government considers it to be merely unclassified excavation necessary to conform to the plan grade and cross section. The word undercut is not used in the plans with reference to the bottom of the plating.² The photographs introduced by the appellant as showing undercut on the completion contract³ are not identified by any testimony relating the pictures

to the design elevation at the bottom of the plating.⁴

The primary question remaining, however, is whether the tolerances applied at the bottom of the plating were reasonable. The Government suggests that Federal custom and usage developed in more than 20 years of construction on the Natchez Trace should prevail in determining the reasonableness of the tolerances.⁵ While we agree with the general proposition that Federal custom, when clearly established, should prevail over state or local usage, we are constrained to observe that the Government selected, as its only expert on the question of tolerance, an official from the Tennessee Department of Highways.

Mr. Champion's testimony was concise and fully documented as to the statewide standardization of tolerances allowed since 1961, for the various levels of highway construction in appellant's home state of Tennessee. No such written standardization was present on the Natchez Trace, where the tolerances to be applied were left to the judgment of the resident engineer on each project. The fact that the resident engineer on this project may

¹ *WRB Corp. v. United States*, 183 Ct. Cl. 409 (1968).

² The word undercut appears but once in the plans, on page 7, and refers to an area where topping but no plating is specified. Volume 1, Appeal File.

³ Appellant's Exhibit 3(a) through 3(ccc).

⁴ The testimony of Government Inspector Horace Allen was that most of the photographs depicted spot undercutting, the extent of which was dictated by the amount of soft or unsuitable material found in the grading and not by the design of the road. In some pictures, the material being used for backfill was the same as that found underneath. In neither case was a design level of the road involved and controls were not used (Tr. 2966-92). This testimony stands unrefuted.

⁵ Government's Posthearing Brief, pp. 187-88.

have applied similar tolerances on other projects does not preclude the possibility that other tolerances were applied by other engineers and does not meet the test for establishing a trade custom.⁶

Since the appellant may properly be charged with knowledge of clearly established trade customs in his home state, we find that the trade customs prevailing in road construction in Tennessee form a suitable basis for determining whether the tolerances imposed here were reasonable.

The terminology varies slightly from Tennessee to the Natchez Trace but the various layers are clearly comparable. The layer below the base course in Tennessee is called capping, while on the Natchez Trace it is called topping. There is no layer in Tennessee comparable to plating, but plating, topping and capping all fall within the definition of subbase adopted by the American Association of State Highway Officials (AASHO), and subbase is the lowest layer of the pavement structure, which in turn rests on the top surface of the subgrade.⁷ We find that a tolerance of

0.1 foot is reasonable at the top surface of the subgrade, which plane is also the bottom of the plating, where plating is required, and the bottom of the topping elsewhere. We further find that inspection of the top surface of the subgrade with string lines from the blue top stakes was reasonable and in accord with trade custom.

The appeal is allowed to the extent that the appellant was required to grade the level at the bottom of the plating to a tolerance closer than 0.1 foot prior to April 20, 1966.⁸ The appeal is denied with respect to that portion of the claim involving grading to a three-inch tolerance after April 20, 1966.

We make no finding as to the number of yards graded to the one-inch tolerance, nor do we make a finding as to the amount of time or degree of difficulty involved in achieving the one-inch tolerance as opposed to the 0.1-foot tolerance we find to be reasonable. These matters go to quantum and such issue was reserved by agreement of the parties.

Claim B

This claim involves an allegation that the Government required excessively close tolerances on the subgrade below the topping.⁹ The tolerances allowed were one-fourth

⁶ See *Eder Electric Co. v. United States*, 205 F. Supp. 305 (E.D. Pa. 1962).

⁷ Government Exhibit Q, AASHO Highway Definitions adopted by the American Association of State Highway Officials.

"Pavement structure.—The combination of subbase, base course, and surface course placed on a subgrade to support the traffic load and distribute it to the roadbed.

"Subgrade.—The top surface of a roadbed upon which the pavement structure and shoulders are constructed.

"Subbase.—The layer or layers of specified or selected material of designed thickness placed on a subgrade to support a base course."

⁸ The date of the conference referred to in the text *supra* at which the reasonableness of the tolerances being imposed was discussed.

⁹ According to the AASHO definitions (Note 7, *supra*) the level at the bottom of the topping would be subgrade only where no layer of plating was required. Mr. Caldwell uses the terms "level below the topping" (Tr. 766) and "subgrade" (Tr. 775) interchangeably in his testimony.

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inch prior to April 20, 1966, and one-tenth foot thereafter.¹⁰

Mr. Edward Caldwell testified that he "had never been required to grade a road at the level of below topping to anything closer than a tenth tolerance and then it wasn't stringlined and checked unless there was some obvious crown at the quarter point or something like that," (Tr. 766) but the following day, referring to the level at the bottom of the topping, he stated: "I've never had a string line put on a set of blue tops at subgrade * * *." (Tr. 775.)

Mr. Caldwell stated that he considered "one tenth foot would be reasonable tolerance if you were going to actually measure it." (Tr. 774.) He considered it unreasonable to measure with a string line (Tr. 775).

In support of his contention that 0.1 foot was a reasonable tolerance at the top of the subgrade, the appellant introduced a copy of the Mississippi Standard Specifications for Road and Bridge Construction, 1956 Edition,¹¹ which provided for an allowable vertical tolerance of 0.1 foot at the top of the subgrade.

The appellant also introduced a number of photographs taken during the period from August 14 through September 25, 1967, which purported to show that less stringent standards were required of the completion contractor with respect to the smoothness of the subgrade prior to placing topping.¹²

The Government's expert witness on the question of tolerances, Mr. Champion, agreed with the appellant's contention that one-tenth foot was a reasonable tolerance at the top of the subgrade when he testified that the Tennessee Department of Highways had allowed such tolerance since 1961 (Tr. 2170). However, the practice in Tennessee was to require blue tops at that level¹³ and stringlining from the blue tops is a normal procedure (Tr. 2167, 2182).

Mr. Grant, Resident Engineer in charge of Project 3-0-7, testified that he had applied a tolerance of one-fourth inch at the bottom of the topping on 35 Natchez Trace projects he had supervised since 1948 (Tr. 2112-16). He further testified that use of string lines on blue tops was a common and convenient method of determining compliance with the tolerances allowed (Tr. 2143).

Decision

The Government engineers and inspectors were consistent in their testimony that stringlining from blue tops was a customary method of checking grades.¹⁴ Mr. Caldwell, on the other hand, testified variously that stringlining from blue tops at the subgrade level was done sometimes (Tr. 766) or never (Tr. 775). The photographs introduced by the appellant and identified as relating to the subgrade or bottom

¹⁰ Tr. 763; Government Exhibit CC.

¹¹ Tr. 791, Appellant's Exhibit 18.

¹² Appellant's Exhibit 4(a)-4(ss).

¹³ Government Exhibits EE, FF.

¹⁴ Tr. 1549; 2143; 2095; 3063.

of the topping¹⁵ reveal nothing regarding either the tolerance applied at the subgrade or the means of applying it.¹⁶ We also observe that the appellant did not allege that the use of stringlining was inaccurate in checking grades. We find the preponderance of the evidence lies with the Government on this question and that use of stringlining at the level below the topping was reasonable.

The primary question here, as in Claim A, is whether the tolerance permitted was reasonable. The statement of Regional Engineer Roderick S. Banks that he considered application of tolerances to be a matter of engineering judgment in the individual case (Tr. 1536) clearly negates the Government's contention that a Federal custom of long standing was involved.¹⁷ Project Engineer Grant's testimony that he had applied the same tolerances on other projects (Tr. 2112-2115) is evidence of his engineering judgment, not of a Federal custom.

In the absence of a Federal custom, we look to the documented practices followed in Mississippi and Tennessee¹⁸ which are consistent in allowing a tolerance of one-tenth foot at the subgrade level, which is the bottom of the topping in Mississippi and the bottom of the capping in Tennessee. We find such

tolerance to be reasonable at the bottom of the topping in the present case.

The appeal is allowed to the extent that the appellant was required to grade the level at the bottom of the topping to a tolerance closer than one-tenth foot prior to April 20, 1966. The appeal is denied as to that portion of the claim involving grading to a one-tenth foot tolerance after that date.

As in Claim A, we specifically make no finding as to the number of yards graded to the one-fourth inch tolerance nor do we find the amount of time or degree of difficulty involved in achieving the one-fourth inch tolerance as opposed to the one-tenth foot tolerance we find reasonable.

Claim C

The appellant alleged that the Government required unreasonable tolerances in the grading of cut and fill slopes, contrary to Section 102-3.8 of FP-61 (Rounding, Warping and Finishing Slopes). It also alleges that because of Government errors in setting slope stakes, the appellant was required to regrade the slopes, thus performing extra work for which it is entitled to an equitable adjustment.

The appellant's evidence regarding this claim consisted primarily of the testimony of its Executive Vice President, Edward S. Caldwell, who testified extensively regarding his views on trade practices in construction and inspection of slopes (Tr. 524-645).

¹⁵ App. Exh. 4(a)-4(ss).

¹⁶ Chief Inspector Horace D. Allen's testimony regarding the inconclusive nature of the evidence in these photographs (Tr. 3049-3069) was not refuted.

¹⁷ Government's Posthearing Brief, p. 186.

¹⁸ App. Exh. 18; Government Exh. EE and FF.

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Mr. Caldwell testified that he became aware of the problem of the tolerance required on the slopes on or about May 18, 1965, when he found his foreman setting blue tops on the slopes (Tr. 525). He learned that the Government inspector was going to require a tolerance of .2 foot on the slopes. Although he protested this requirement, he told his foreman that if a .2 tolerance from the slope stakes was required, they would have to set blue tops on all the slopes (Tr. 526). Mr. Caldwell considered that Section 102-3.8¹⁹ should govern the operation and such specification did not require a

close tolerance but merely inspection as viewed from the road. He stated he had never before had an engineer require a slope to be graded to a .2 tolerance from the slope stakes (Tr. 528). Mr. Caldwell stated his belief that the Mississippi highway specifications set a reasonable tolerance (.5 foot horizontally) for slopes (Tr. 838).

Mr. Caldwell stated he could not testify as to the method used by Mr. Allen to check all the slopes, but he suspected that Mr. Allen was checking them by some means other than by visual inspection from the road as called for in the specifications (Tr. 596-600).

Mr. Caldwell further alleged that many of the slope stakes were erroneously set by the Government, causing extensive regrading of the slopes when the errors were discovered, primarily when the roadway grading stakes were set (Tr. 556-57). He stated that an employee of his, Mr. Winston Pugh, had checked a long section of slope stakes and could testify as to the errors (Tr. 557).

Although he stated that he had no records on which to base his estimate, Mr. Caldwell estimated that two-thirds of the square yardage on the slopes was graded twice and one-half was graded three times (Tr. 601, 627).

Mr. Pugh testified that he was employed by the appellant in the fall of 1965 (Tr. 1167). Mr. Pugh stated that at Mr. Caldwell's request he checked an area about 1,500 feet on both sides of the road

¹⁹ Tr. 527; Section 102-3.8 of FP-61 reads as follows:

"102-3.8 Rounding, Warping, and Finishing Slopes:

"(a) *Rounding*.—Except in solid rock, the tops and bottoms of all slopes, including the slopes of drainage ditches, shall be rounded as indicated on the plans. Rock that is decomposed to such an extent that it has the same workability as earth shall be considered as earth. A layer of earth overlying rock shall be rounded above the rock as done in earth slopes.

"(b) *Warping*.—Adjustments in slopes shall be made to avoid injury to standing trees or marring of weathered rock, or to harmonize with existing landscape features, and the transition to such adjusted slopes shall be gradual. At intersections of cuts and fills, slopes shall be adjusted and warped to flow into each other or into the natural ground surfaces without noticeable break.

"(c) *Finishing*.—All earth slopes shall be finished to reasonably smooth and uniform surfaces without any noticeable break, and in substantial accordance with the planes or other surfaces indicated by the lines and cross sections shown on the plans, with no variations therefrom readily discernible as viewed from the road.

"Degree of finish for grading of slopes shall be that ordinarily obtainable either from blade-grader or scraper operations or hand-shovel operations, as the contractor may elect. The nicety of finish ordinarily associated with template and stringline or hand raking methods will not be required, except in the case of shoulders and gutters."

for errors in the slope stakes (Tr. 1171-72, App. Exh. 29). He found only one slope stake which was outside the normal criteria for highway construction (Tr. 1218).

Mr. Robert H. Cowan testified that he was in business under the name of Cowan Construction Company, Incorporated, from 1961 to 1965, and that he was associated with the appellant in preparing the successful bid on Project 3-0-7 (Tr. 50-65). Mr. Cowan's equipment and his personal services as supervisor were employed on the project pursuant to a contract of employment.²⁰ Mr. Cowan testified that he, not Mr. Caldwell, ran the project while he was on it (Tr. 118). For reasons which do not appear in the record, Mr. Cowan left the project early in 1965 and his equipment was sold to satisfy certain indebtedness to the appellant (Tr. 1407-1408).

Mr. William C. Stinson testified that he was superintendent for the Cowan Construction Company on Project 3-0-7 in 1964 (Tr. 2044) and that his plan was to move dirt quickly and he did no fine grading in 1964 (Tr. 2055). It was his experience on other projects that slopes were finished to a tolerance of .2 to .3 foot (Tr. 2064). Mr. Stinson stated it was his practice to build fills a little wide in order to have material to work with in finishing a job (Tr. 2070).

Mr. Russell H. Giles, who replaced Mr. Stinson as superintendent in April 1965 and remained until December of that year (Tr. 2995),

agreed with Mr. Stinson that no fine grading had been done when he arrived. Mr. Giles described the condition of the project as very rough and stated the slopes were out of grade as much as one to five feet (Tr. 2995). None of them were within any reasonable distance of the grade, according to Mr. Giles (Tr. 3003). Mr. Giles stated that he took the initiative in setting blue tops in order to bring the slopes to grade (Tr. 3000).

Mr. Giles testified that he had no trouble from the Government in getting slopes accepted (Tr. 3003). When he got a slope ready for inspection it was checked only once (Tr. 2997-98). When he left the job after the 1965 grading season, the slopes were done (Tr. 3003).

Mr. Gurvis C. Phillips testified that he was assigned to grading inspection on Project 3-0-7 (Tr. 1614). Mr. Phillips stated that contractors on other projects on the Natchez Trace that he had worked on checked the slopes as they were being built (Tr. 1617) but Mr. Cowan did not do that on this project (Tr. 1618). Mr. Phillips stated that the slopes were not regraded after Mr. Giles brought them to the required tolerance of .2 to .3 foot, but the slopes were rebladed prior to placing topsoil in order to fill any washes that might have occurred since they were originally checked (Tr. 1628-29).

Mr. Horace D. Allen, Chief Inspector on Project 3-0-7, testified that when Mr. Giles started his slope dressing operation in 1965,

²⁰ Tr. 1110-11; Govt. Exhibit F.

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most of the slope stakes were gone. Mr. Giles asked the Government inspectors for help and it was agreed that the Government personnel would assist in setting the grading plugs or blue tops on the slopes (Tr. 2676-79). Mr. Allen stated the term blue tops should apply more properly to the grading stakes set at the bottom of the roadway at various layers of material and which were set with an engineer's level within .01 or .02 foot of true grade (Tr. 2682). Mr. Allen explained that the slope stakes were set with a hand level which has an accuracy only to .2 or .3 of a foot (Tr. 2691). Mr. Allen stated that his method of checking the slopes was visual inspection (Tr. 2683) and that he did not use a hand level (Tr. 2684). After a slope had been accepted, any erosion that occurred before placing topsoil had to be corrected. The correction was checked by visual inspection only (Tr. 2684).

Mr. Allen testified that the slopes that received rip-rap were required to be graded to a tolerance of .1 foot and that he checked the tolerance with a hand level and a tape (Tr. 2772).

Decision

The question of the reasonableness of the tolerances required for grading the slopes may easily be resolved by applying the standard proposed by Mr. Caldwell. Referring to the Mississippi Standard Specifications for Road and Bridge Construction (App. Exh. 18), Mr. Caldwell stated that the horizontal

tolerance specified therein (.5 foot) was reasonable (Tr. 838). Later he equated a .5 foot horizontal tolerance with a vertical tolerance of one-fourth of the half-foot on a four to one slope (Tr. 1262). Most of the slopes were on a four to one ratio (Tr. 2139). We observe, therefore, that Mr. Caldwell recommended a vertical tolerance of .125 foot as reasonable and the Government was allowing a .2 foot tolerance. The objection cannot be to the tolerance in this circumstance, but to the method of applying the tolerance.

Mr. Allen testified that he applied the tolerance of .2 to .3 foot by visual inspection of the slopes (Tr. 2683). This statement was not contradicted by a mere suspicion on the part of Mr. Caldwell that Mr. Allen used some other means of checking (Tr. 596-600). We find that the tolerance of .2 to .3 foot for grading the slopes and the means used for applying such tolerance were reasonable.

There is one exception to such finding. Mr. Allen admitted that slopes that were to receive rip-rap were required to be within .1 foot and were checked with a hand level and tape (Tr. 2772). No testimony was adduced for this departure from the procedure used on the other slopes.

We find the tolerance applied to rip-rap slopes to be unreasonable in comparison with the greater tolerance allowed on all other slopes. We further find that the method of applying such tolerance by hand level and tape is clearly outside the pro-

visions of Section 102-3.8 of FP-61 which specifies that slopes shall have no variations readily discernible as viewed from the road.

The remaining portion of this claim that Government errors in staking caused, regrading was discussed in general, nonspecific terms by Mr. Caldwell. The only specific testimony in this regard is that of Mr. Pugh, who checked 1,500 feet on both sides of the road and found one slope stake which he considered outside the normal criteria for highway construction (Tr. 1171-1218). However, according to Mr. Caldwell, one stake out of line causes no problem in grading since an average of five or six stakes will give a good line to follow (Tr. 555).

The testimony of Mr. Allen that slope stakes were set by a hand level having an accuracy of .2 to .3 foot, while the roadway grading stakes were set by an engineer's level having an accuracy of .01 to .02 foot (Tr. 2682-83), is sufficient to establish that there could have been discrepancies between slope stakes and roadway grading stakes. It is not established that these discrepancies resulted in any regrading. On the contrary, Mr. Stinson's testimony that he did no fine grading in 1964 (Tr. 2055) and Mr. Giles' testimony that none of the slopes were close to grade when he started work in 1965 (Tr. 3003) are a clear indication that Mr. Giles was grading the slopes to the tolerance required for the first time rather than regrading the slopes. Mr. Giles' unequivocal statements that he had no trouble

getting slopes accepted and that when he got a slope ready for inspection, it was checked only once (Tr. 2997-98) do not support a conclusion that he was engaged in regrading.²¹

The claim is allowed to the extent that the rip-rap slopes were required to be graded to an unreasonable tolerance of .1 foot and inspected by a method inconsistent with FP-61. The claim is denied with respect to the remainder of the slopes.

Claim D

The appellant alleged that the Government required extra work and imposed unreasonable restrictions prior to allowing placement of A-6 borrow materials in the undercut areas and in fills in the north section of the project, for which it is entitled to an equitable adjustment of the contract (Complaint, Paragraph 2D).

The allegation of unreasonable restrictions was set forth in more detail in the claim brief of June 28, 1968, to the contracting officer (Appeal File, Volume II). The appellant alleged that prior to allowing

²¹ On the evidence of record, we cannot rule out the possibility that when Mr. Caldwell assumed supervision of the project after Mr. Cowan's departure, he mistakenly assumed that the slopes had been built to within a reasonable tolerance of grade, and that Mr. Giles' operations were regrading. Any subsequent smoothing of eroded areas before placing topsoil could then have been considered by Mr. Caldwell to be a third grading. However, since Mr. Caldwell's estimates of the percentage of slopes graded twice and three times are admittedly not based on records but on assumptions (Tr. 601), we have no basis for considering the estimates as anything but a repetition of the original allegation in a slightly different form.

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placement of A-6 borrow, the Government required removal of all unclassified excavation and balancing material in five balance sections rather than in 22 balance sections as shown in the plans. The appellant further alleged that the Government required an unreasonable sequence in grading which required the appellant to leave long sections of previously finished slopes and undercut areas of Jackson clay exposed to the elements for long periods of time and caused extensive drying and recompacting operations in order to regrade the material.

The contracting officer's findings of fact dated January 6, 1970 (Appeal File, Volume I) denied Claim D and found: that the construction balance points varied from those shown on the plans because of the appellant's election to cross haul for its own convenience; that utilization of roadway excavation in embankments within balance sections before placement of borrow was in accordance with Section 102-1.2, FP-61; that it was necessary for slope rounding and slope grading to be sufficiently complete so that any work remaining to be done after placing borrow for plating and topping would not be detrimental to those materials; that performance of grading, finishing and related work on the roadbed was entirely within the control of the appellant and the Government did not require long sections of previously finished roadbed and slopes to be exposed to the elements for long periods of time; and that if the appellant had

used due care in working from slope stakes and had properly controlled both the sequence and accuracy of his operations, the regrading and refinishing work would have been unnecessary.

Mr. Caldwell testified regarding Claim D (Tr. 720-738). The nature of his testimony was set by his statement in response to the following question:

Q. Mr. Caldwell, I will refer you to Item D, Page 16 of the June 28, 1968, claim letter, "Restrictions on Placement of Borrow on the Parkway and Restrictions on Placement of Topping on Incidental Roads." Can you tell us what that claim is?

A. Well, that claim is I think written out clearly enough that I will try not to go over anything except maybe the high points a little bit. (Tr. 719-20.)

The remainder of Mr. Caldwell's 18 pages of testimony on Claim D did not refer to the contracting officer's findings or attempt to show wherein they were erroneous, but merely repeated and expanded the original allegations contained in the claim letter.

Decision

This Board has held that mere statements in letters and assertions in appellant's complaint cannot be accepted as proof of facts.²² The Court of Claims had earlier expressed a similar view.²³ We are not persuaded that a repetition of the

²² *Okland Construction Company, Inc.*, IBCA 871-9-70 (March 23, 1971), 71-1 BCA par. 8766; *Wickes Engineering & Construction Company*, IBCA-191 (November 30, 1960), 61-1 BCA par. 2872.

²³ *La Societe Nationale De Construction v. United States*, 137 Ct. Cl. 633 (1957).

allegations in a claim letter in the oral testimony of the appellant's Executive Vice President adds any significant weight to such allegations. It has been held that a mere expression of opinion by a company official is insufficient to support a claim.²⁴

We find that the appellant has failed to sustain its burden of proof with respect to Claim D.²⁵

The appeal is denied as to Claim D.

Claim E

The appellant alleged that the Government required extra work in drying and processing material in undercut areas, county crossroads and fills prior to placement of A-6 borrow-material or A-2 topping, and that the Contracting Officer's decision of January 6, 1970, which allowed \$2,607 and 18 days as an equitable adjustment, is grossly inadequate.

At a conference between Mr. Caldwell and Government engineers on April 20, 1966, the Government agreed to pay for drying and processing Jackson clay in cuts on which the 2'4" layer of special borrow was to be placed.²⁶

²⁴ *Algernon Blair, Inc.*, ASBCA No. 8496 (September 17, 1963), 1963 BCA par. 3862.

²⁵ Unlike the situation in Claims A, B and C, *supra*, the Government witnesses made no statements which could be construed as favorable to Appellant's Claim D, but consistently and repeatedly denied the appellant's allegations (Tr. 141, 1520, 1620, 1746, 2690, 2700).

²⁶ Memorandum dated April 25, 1966, from Regional Engineer G. A. Wilkins Trial Counsel's File, Vol. I, page 23. The paragraph relating to Claim E is as follows:

"We also agreed to process a change order to pay for the work of aerating and con-

Change Order No. 6 was issued by the Government in accordance with the agreement reached at the conference on April 20, 1966 (Appeal File, Vol. II). As a result of experience in two test cuts which showed that an average of 1,353 square yards per day were processed at a cost of \$.11 per square yard, the change order proposed to add \$6,576.68 to the contract price and 44 days to the contract time for the 59,788 yards on the entire project which would require scarifying, drying and compaction.

By letter of September 16, 1966, Mr. Caldwell declined to sign Change Order No. 6, stating that he felt that both parties should reserve the right to review the change order at the completion of the job (Appeal File, Vol. II).

Mr. Caldwell testified that normally drying a fill is a contractor's responsibility but he felt that fills came under entitlement for compensation in the particular circumstances on this project (Tr. 646).

solidating the Jackson clay material in cuts on which the 2' 4" thickness of special borrow is to be placed. This would be an equitable price per sq. yd. to compensate the contractor for this. The price will be determined by keeping account of the cost incurred for doing this work in the cuts between stations 132+50 and 139, 141+50 and 147+50. Additional working time to be allowed will also be determined from the experience in these cuts. Payment for this work will be made retroactive for similar work done in cuts already graded and back filled. We are to pay for this processing only one time. The contractor asked that the payment be made for as often as he had to do it, but we objected to this because the work was preparation for a subsequent operation and could be lost if the sequence was not immediately followed. The sequence was under the contractor's control and not ours."

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Mr. Caldwell did not cite a contractual provision as basis for this assertion, however. Using a cost figure of \$1.20 per square yard, an average of 353.08 square yards processed per day, and claiming 118,444 square yards as affected by the drying and processing operation, the appellant asked for an increase of \$138,932.80 in the contract price and a time extension of 335.459 days. (Claim brief letter of June 28, 1968, Appeal File, Vol. II.)

The contracting officer found that the appellant actually processed a total of 23,700 square yards in cuts rather than the estimated figure of 59,788 which was stated in proposed Change Order No. 6. He allowed a total of \$2,607 additional compensation and an extension of 18 days (Appeal File, Vol. I).

Mr. Allen testified that the appellant has included the time spent in the test cuts to dress the subgrade to the allowable tolerance after drying and compaction were completed on July 27, 1966 (Tr. 2758-60). The appellant's larger total of square yards processed resulted from a number of factors such as use of 50 feet for the width of the roadway rather than the 48 feet specified in the plans, inclusion of fills as well as cuts and inclusion of areas where there was no drying or compacting of the subgrade as described in the agreement and the unsigned change order (Tr. 2725-58; Govt. Exh. OO). Mr. Allen stated that his station by station analysis of the number of yards processed disclosed that 15,140 square yards of drying and

compacting were omitted from the Contracting Officer's finding of 23,700 square yards and the correct total is 38,840 (Tr. 2757; Govt. Exh. PP). The increased total of yards processed entitled the appellant to an additional extension of 11 days of contract time for a total extension of 29 days (Tr. 2757).

Decision

Proposed Change Order No. 6 directed the appellant as follows:

Scarify the Jackson Clay in cuts, as directed a depth of six (6) inches below subgrade elevation, aerate by disk and manipulation to dry the material to optimum and compact to the required 95% density, Standard Proctor Method.

The Change Order also recited the following description and reason for change:

The high moisture content in the heavy clays, commonly known as Jackson Clay, encountered in the cuts on the project causes a very unstable subgrade and foundation for the roadway. It is deemed essential that this material be loosened by scarifying to a depth of approximately six inches below the actual subgrade, aerated by manipulation to dry back to optimum and then compacted to 95% density, Standard Proctor Method, before succeeding courses of material are placed. It was agreed to, in a conference held April 20, 1966, with Regional Engineer Wilkins, District Engineer Banks and Resident Engineer Grant of the Bureau of Public Roads and Mr. Edward S. Caldwell, Vice President of H. W. Caldwell and Son present, that the work involved was more than would normally be expected under terms of the contract and that extra compensation and an extension of time was due the contractor.

It was agreed that the two cuts between Stations 132+50 to 139+00 and

141+50 to 147+50 would be processed, with Bureau of Public Roads personnel keeping accurate records of labor and equipment used, and time required to perform the work. The area involved would be measured and from this information a unit price per square yard of manipulation, aerating and compacting cuts could be negotiated for the areas involved and the extra time that should be allowed could be determined.

It is apparent that the agreement regarding drying and compacting in cuts which was reached at the conference on April 20, 1966, was a tentative agreement at best, as evidenced by the appellant's failure to sign the proposed change order. However, both parties thereafter behaved in a manner consistent with a belief that extra compensation should be allowed for such work. The work was performed in the test cuts and Government records were kept as agreed to provide a basis for increased compensation for drying and compacting in other cuts on the project. Even the appellant's failure to sign the change order was not inconsistent with an expectation of increased compensation.²⁷

We will not, therefore, look behind the contemporaneous interpretation of the contract by the parties to determine the necessity for increased compensation. The question presented by this appeal is whether the amount allowed by the Government was adequate.

Mr. Caldwell's testimony that drying a fill is normally a Contractor's responsibility (Tr. 646) is in

accord with the provisions of FP-61, Section 106-3.4, Placing Embankment, and 106-3.5, Compaction. His opinion that extra compensation should be allowed for drying and compacting fills is contrary to the applicable provisions of the contract prohibiting direct payment for such work, which is considered a subsidiary obligation of the contractor, covered under contract unit prices for performance of work under other sections.²⁸ Since payment for drying and compacting fills is outside the scope of the tentative agreement by the government to pay extra compensation for drying and compacting material in cuts, we find no basis for including the number of square yards in fills in the total number of square yards for which extra compensation should be allowed.

We have found in Claims A and B, *supra*, that the tolerance required at the subgrade level of construction was reasonable after being relaxed at the conference on April 20, 1966. Since the tentative agreement regarding drying and compacting, reached at the same conference, did not include grading to the required tolerance, we find no basis for the

²⁸ FP-61, Section 106-5.1:

"No Direct Payment. Performance of work prescribed in this section is not payable directly but shall be considered as a subsidiary obligation of the contractor, covered under the contract unit prices for performance of work under sections 102, 103, 104 and 105, as the case may be, except that when the bid schedule contains an estimated quantity for 'Watering' or 'Rolling,' any watering or rolling required for compaction of embankments shall be paid for as provided under section 108 and section 109, respectively."

²⁷ A contractor's failure to formalize an oral agreement regarding a change does not of itself impeach that agreement. *Amcon Corp.*, ASBCA No. 7132 (October 27, 1964), 65-1 BCA par. 4532.

appellant's inclusion of such work in its cost computation.

Examination of the plans which are a part of this contract (Vol. I, Appeal File) discloses that a typical cross section for the parkway road specifies a distance of 24 feet from the center line to the back of the ditch in cuts, for a total width of 48 feet (Page 3 of Plans). The appellant's use of 50 feet for the width of the subgrade dried and compacted is clearly erroneous, unless the appellant did not comply with the width specified in the plans.

We are left with the Government's computation of the number of square yards processed in cuts. In accordance with such computation as set forth in Government's Exhibits AA and PP, we find that the appellant is entitled to additional compensation over and above that allowed by the contracting officer.

The claim is allowed to the extent that the appellant is entitled to extra compensation for an additional 15,140 square yards of material processed in cuts and an additional time extension of 11 days.²⁹

²⁹ Since the issue of quantum has been reserved, we make no determination as to the proper amount of the equitable adjustment in either time or money. Within the framework of the findings made above with respect to particular elements of the claim, the total yardage involved, the additional time to which the contractor may be entitled and the amount payable per square yard are all matters for determination by the contracting officer in the first instance based upon such evidence as is available or such additional evidence as the appellant cares to submit in support of the amounts claimed for these items.

Claim F

The appellant alleged that the Government unreasonably restricted the placement of topsoil on slopes, thus requiring extra work for which the appellant is entitled to an equitable adjustment of the contract.

Mr. Caldwell testified that when he took over personal supervision of the job in 1965, he recognized that some slopes were receiving severe damage from the weather by erosion and saturation of the exposed Jackson clay (Tr. 850-51). He conceived a plan of covering the slopes with topsoil after they had been dressed (Tr. 851-52). Mr. Caldwell stated that when he was ready to begin placing topsoil (about September 3, 1965) Mr. Allen told him that all topsoil placed would have to be grassed before the end of the grassing season on October 15 (Tr. 852-53). Mr. Caldwell recalled that he eventually got permission to place topsoil only after agreeing to put temporary seeding on the topsoil, then reclean the slopes in the spring and seed to the specification (Tr. 854-55).

Mr. Caldwell took photographs³⁰ of the slopes in April of 1966 for the purpose of recording the extent of erosion over the winter (Tr. 856-57, 862). Mr. Caldwell testified that he was paid for the topsoil placed on the slopes depicted and that he was not required to place additional top-

³⁰ Appellant's Exhibits 22(a) through 22(g).

soil, but was required to shape the slopes back up to a smooth grade. The slopes were not checked to any tolerance, but were accepted by eye after being shaped to a smooth grade (Tr. 858-59).

Mr. Allen testified that Mr. Caldwell first discussed placing topsoil sometime in the latter part of August or in September 1965 (Tr. 2770), at which time he informed Mr. Caldwell that he could place topsoil on any area that was properly dressed to receive it. Mr. Allen recalled, without checking the records, that topsoil was placed off and on through October and possibly into November 1965 (Tr. 2770).³¹

Mr. Grant testified that Mr. Caldwell asked at the start of the grading season in 1965 if it was satisfactory to place topsoil on the slopes as soon as they were fine graded. Mr. Grant told Mr. Caldwell that he would welcome it and that he preferred topsoil to be placed immediately and then seeded, which is good construction (Tr. 2283). Mr. Grant stated that no topsoil was placed by the appellant until near the end of the seeding season (which ran through October 15) and that no arrangements had been made for a seeding subcontractor or for testing seed samples for germination. Mr. Grant

stated that he allowed Mr. Caldwell to continue to place topsoil provided that the topsoil was shaped and seeded temporarily at the contractor's expense (Tr. 2284-85). Mr. Grant expressed the opinion that topsoil placed on slopes without protection of mulching and seeding would erode severely to as much as 50 percent (Tr. 2286), an opinion with which Mr. Allen concurred (Tr. 2771-72).

Decision

This claim involving placement of topsoil on the slopes is closely related to the claim regarding the tolerance required in finishing the slopes (Claim C, *supra*). In view of Mr. Grant's advice to Mr. Caldwell early in 1965 that he would welcome placement of topsoil on the slopes as soon as they were fine graded, it would appear that delay in placement of topsoil throughout most of the year was the result of the condition of the slopes and the time required to bring them to grade, rather than a restriction by the Government. Since we have held with respect to Claim C, *supra*, that the tolerance allowed on the slopes and the means of checking it were reasonable, we find no basis for a further claim involving the time spent in bringing the slopes to grade.

The only restriction placed by the Government was near the end of the seeding season when no time remained to arrange for a seeding subcontractor nor to test seed for germination. In view of Mr. Caldwell's testimony that the unprotected

³¹ Project Diaries kept by Mr. Allen (Govt. Ex. JJJ) record placing of topsoil on September 28, 1965, October 19, 21, 22, 23, 25, 26, 27, 28, 29 and 30, 1965 and November 1, 2, 3, 5, 11, 12, 13 and 18, 1965. Temporary seeding was started on November 9, 1965, according to the diary entry for that date. The diaries recorded that the project was under stop order from September 30 through October 3, 1965, and from October 6 through 11, 1965.

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ed slopes suffered considerable damage during the winter of 1964-65 (Tr. 850-51) and the photographs he took showing damage to slopes the following winter (App. Ex. 22a-g), the necessity for protecting slopes from the winter weather is clearly established. We find that the restriction designed to protect the slopes by permitting placement of topsoil with temporary seeding, when the contractually required seeding could not be accomplished, was eminently reasonable.

The claim that the Government unreasonably restricted placement of topsoil on the slopes is denied.

Claim G

The appellant alleged that the Government provided erroneous offset distances to the appellant for slopes on which rip-rap was to be placed, thereby causing extra work for which the appellant should be entitled to an equitable adjustment.

Mr. Allen testified that the slope stakes were set to the finished slope line and no allowance was made for rip-rap as far as staking was concerned (Tr. 2773). Mr. Allen so informed Mr. Stinson (Tr. 2773). According to Mr. Allen's testimony, Mr. Stinson told him that he was going to build the slopes out to the approximate finish line so he would have firm ground to work on when he finished the slopes to receive the rip-rap. (Tr. 2774.)

Mr. Stinson testified that it was his practice to build slopes wide and then cut them back to receive the rip-

rap and he followed this practice on Project 3-0-7. It was his decision to build the slopes in this manner and he did not discuss the matter with Mr. Caldwell (Tr. 2053-55).

Mr. Caldwell's testimony regarding his discovery that the slopes were built wide and then cut back to receive rip-rap contained no indication that he had ever discussed the matter with his superintendent, Mr. Stinson (Tr. 476-85).

Decision

Mr. Caldwell's belief that the Government caused extra work with respect to the building of rip-rap slopes is clearly contrary to the testimony of the appellant's superintendent, Mr. Stinson, as narrated above.

The claim is therefore denied.

Claim H

The appellant alleged that the Government caused extra work by requiring dumping of A-6 material or topping on the subgrade and pushing it ahead by bulldozer.

Mr. Caldwell testified that this was a small item as far as the total job was concerned, but he estimated that production was cut in half by an operation of this type (Tr. 867). Mr. Caldwell acknowledged that a subgrade of Jackson clay would move when heavy equipment was put on it (Tr. 864-67) but he felt that the subgrade would also move when a superior material is dumped on the subgrade and pushed ahead with a bulldozer or rubber tired

dozer, so the procedure was unnecessary (Tr. 865-66). Mr. Caldwell alleged that delay occurred when a truck or scraper dumped material and the following machine had to wait for a bulldozer to spread the material before the next load could be dumped (Tr. 867-68).

Mr. Allen testified that the sole purpose for dumping and pushing ahead was to protect the subgrade (Tr. 2791) and that he considered the method employed to be a satisfactory way of accomplishing the purpose (Tr. 2794). The operation did not require additional equipment or personnel since the material would require spreading regardless of the method of dumping (Tr. 2791-92). Mr. Allen further stated that the appellant usually had four or five trucks engaged in hauling from a pit around a mile or a mile and a half away so there was ample time to spread the material dumped by one truck before the following truck arrived (Tr. 2792).

Mr. Allen also stated that the only time dumping and pushing ahead was used was when there was difficulty with the hauling equipment on the subgrade (Tr. 2794). The method was used on other projects on the Natchez Trace (Tr. 2792-93). Rather than dumping and pushing ahead in areas that showed distortion of the subgrades, the contractor could have stopped dumping and plowed and regraded the soft area of the subgrade, or he could have obtained lighter equipment to haul over the subgrade (Tr.

2793). Mr. Allen regarded the method of dumping and pushing ahead as a means of speeding up the operation when distortion occurred on the subgrade (Tr. 2793). He had no recollection of having ever directed the contractor to push material ahead (Tr. 2793).

Mr. Grant testified that it was his impression that the procedure was of benefit to the contractor when it was first discussed and the method was used thereafter when soft spots were found in the subgrade (Tr. 2293-94). According to Mr. Grant the dumping and pushing ahead method was agreeable to both parties (Tr. 2291, 2294).

Decision

Although Mr. Cardwell estimated that production was cut in half when this method of operation was used, his opinion was not shared by any other witness. Both Mr. Grant and Mr. Allen testified that the procedure was beneficial to the appellant in allowing the construction to proceed when soft material was encountered in the subgrade.

The appellant has failed to show by a preponderance of the evidence that the dumping and pushing ahead method was required by the Government. It rather appears that the method was adopted as an acceptable means of showing a common problem.³²

Accordingly, the claim is denied.

³² *R. E. Hall Construction Company, IBCA* No. 465-11-64 (September 26, 1967), 67-2 BCA par. 6597.

Claim I

The appellant alleged that the Government refused to approve material for Case 2 borrow until after such material became practically unavailable because of the flooding of the reservoir near the project, thus causing extra work for which the appellant is entitled to an equitable adjustment of the contract.

Page 4 of the plans (Appeal File, Volume I) specifies the following for the layer of plating: "2'4" Borrow Excavation, Case 2, within these limits shall meet the requirements for soils of the A-4 group, AASHO-M145 classification, where directed."

Mr. Stinson testified that the borrow material placed in the fills in 1964 was not tested for use as plating (Tr. 2056-57). He further stated that he and Mr. Cowan did some drilling when looking for plating but it was after the project was shut down for the winter in 1964 (Tr. 2057).

Mr. Caldwell testified regarding a number of tests conducted in 1964 (Tr. 269-71, 314) but did not testify that the Government refused to approve material which met the specification for the A-4 group of soils.

Change Order No. 5, dated January 25, 1965, relaxed the requirement for A-4 borrow on page 4 of the plans and provided that A-6 soils could also be used (Appeal File, Volume II). This change was initiated by Mr. Grant without a request from the appellant (Tr. 2311-12). No testimony was presented

that, after issuance of such change order, the Government refused to approve material for Case 2 borrow which met the A-6 soil classification.

FP-61, Section 102-1.3(e) provides as follows:

(e) *Borrow, Case 2*—Borrow, Case 2, shall consist of the excavation of material from borrow pits selected by the contractor and approved by the engineer, from which sources the contractor shall obtain the rights from the owners to procure material. He shall pay all royalties and bear all expense of developing the sources and of handling, hauling, and placing the material.

FP-61, Article 6.1(a) provides as follows:

Article 6.1 *Furnishing Materials, Material Sources*:

(a) *Furnishing materials*.—Unless otherwise called for on the plans or in the special provisions, the contractor shall furnish all materials required for the performance of the contract work from sources of his choice, except as provided in 6.1(b) below. All materials shall comply fully with the specifications and the contractor shall satisfy himself as to the kind and amount of work that may be necessary in furnishing the materials.

Decision

The Court of Claims, in dealing with provisions similar to those in FP-61 set forth above, has delineated the rights and duties of the parties to such an agreement in *W.R.B. Corporation v. United States*, 183 Ct. Cl. 409, 461 (1968):

In the first place, it was clearly the responsibility of the plaintiff, under paragraph 1-7 of the contract specifications, to locate and select the borrow areas. The

defendant's personnel had no obligation to the plaintiff in this respect, except to act reasonably in the matter of approving or disapproving borrow sites located and selected by the plaintiff. When the contracting officer responded to the plaintiff's request for assistance in October 1958 by furnishing a map that showed a couple of prospective borrow areas, the contracting officer was rendering a gratuitous courtesy to the plaintiff, rather than discharging a contractual obligation that rested upon the defendant. The defendant is not chargeable with a breach of contract in connection with an act which is not required by the contract, which is done for the benefit of the contractor, and which is taken advantage of by the contractor. *B-W Construction Co. v. United States*, 97 Ct. Cl. 92, 122 (1942); *Vogt Brothers Mfg. Co. v. United States*, supra, 160 Ct. Cl. at page 697.

Although the present claim is not for breach of contract, the rights and duties are similar. Since the appellant has failed to produce any evidence that the Government refused to approve material which met the specifications for Case 2 borrow, we must conclude that the Government acted reasonably.³³

The appellant also introduced testimony relating to statements made by Mr. Grant to Mr. Cowan regarding the availability of A-4 material in bottom lands (Tr. 58-63) which were to be flooded by the reservoir in the winter of 1964-65, apparently on the theory that such

statements misled the appellant. However, we find no evidence to support a conclusion that the appellant conducted sufficient tests in the areas to be flooded to disprove the existence of A-4 material in those areas. In this connection we note that appellant's Superintendent Stinson testified that he and Mr. Cowan did not drill for plating until after the project was shut down for the winter in 1964 (Tr. 2057).³⁴

The claim is therefore denied.

Claim J

The appellant alleged that it encountered subsurface and latent physical conditions in the Hazel Wood cut that were unusual and materially different from those indicated in the contract documents and from a reasonable pre-bid investigation, and that these conditions materially altered the character and nature of the work and

³⁴ The following colloquy occurred during the course of the examination of Mr. Grant by appellant's counsel:

Q. When did you first tell the contractor that the bottom land in the lake area that would later be covered with water was not suitable as A-4 material?

A. I never told him because it would have been erroneous.

Q. The material in the bottom of the lake that was still dry at the time could have been used for A-4 material?

A. In certain areas, yes, sir.

* * * * *

Q. Had the contractor been seeking to use A-4 material?

A. No, sir, he had not.

Q. Because he hadn't taken out any two feet four inches?

A. He had made no provision to use it. As far as I am concerned he had not discussed it with us, he had made no effort to get any area ready for it (Tr. 155-56).

³³ The appellant's reliance upon the portion of FP-61 (Article 4.2 Changes) quoted in the claim brief of June 28, 1968 at page 34 ("It is mutually agreed that it is inherent in the nature of highway construction that some changes in the plans and specifications may be necessary during the course of construction to adjust them to field conditions * * *") is misplaced. See *Appeal of John H. Moon & Sons*, IBCA-815-12-69 (July 31, 1972), 79 I.D. 465, 497, 72-2 BCA par. 9601, at 44,876.

changed the sequence of the appellant's work.

The pre-bid investigation on behalf of the appellant was conducted by Mr. Cowan who testified that he looked at the Hazel Wood cut in question although he did not walk the entire center line (Tr. 50-55). He did not see a spring there before he started grading (Tr. 86). Mr. Caldwell testified regarding the events that occurred after construction started which formed the basis for the claim of changed conditions (Tr. 416-31). Mr. Caldwell stated that the cut was started on July 22, 1964, and excavation continued there until July 31, 1964. After work in the cut had commenced, a wet condition was encountered on the high side of the hill and the further the excavation proceeded, the wetter it got (Tr. 418). The contractor was able to work in the cut again on September 14, 15, 16, 22 and 24, 1964, but performed no other work in the cut during that year (Tr. 418).

By letter of April 21, 1965, Mr. Grant authorized placement of 2,244 linear feet of underdrain in the cut (Tr. 427-28; Appeal File, Volume II). The underdrain was completed with considerable difficulty, on August 19, 1965, and the excavation in the cut was completed on August 30, 1965 (Tr. 429).

Mr. Grant testified that he had observed a "muddy quagmire" in the area of the Hazel Wood cut in 1960 before the center line of the roadway was staked (Tr. 2321-22). He also observed this muddy con-

dition, which was within the roadway prism, five or six times during the next three years (Tr. 2322). He described the problem as not a spring, but a seepage of water over an extended area (Tr. 2320).

Item 520(1) of the contract (Volume I, Appeal File) contains an estimate of 3000 linear feet of 6-inch perforated concrete pipe underdrain for which the appellant bid \$2 per linear foot. Exhibit I to the contracting officer's finding of fact (Volume I, Appeal File) shows the total amount of underdrain placed by the appellant to be 2097.2 linear feet, with an additional 768.9 linear feet placed by the completion contractor, for a total of 2866.1 linear feet of underdrain for Project 3-0-7.

Decision

While the category of changed condition that appellant is claiming is not entirely clear, we have considered the claim under both categories of the clause. In *Perini Corporation v. United States*, 180 Ct. Cl. 768, 778-80 (1967), it was held that to qualify as a changed condition, the unknown physical condition must be one that could not be reasonably anticipated by the contractor from his study of the contract documents, his inspection of the site and his general experience as a contractor in the area.

Mr. Caldwell testified as to his experience as a contractor in the area (Tr. 194-98). To a contractor of his extensive experience, the estimate of 3000 feet of underdrain to

be placed on the project should have been ample warning of a substantial drainage problem. Mr. Cowan's testimony that he did not see a spring, when he looked at the Hazel Wood cut in his pre-bid inspection, falls short of stating that there was no water problem in the area, particularly in view of Mr. Grant's testimony that the problem was not a spring, but widespread seepage.

This Board has held that placement of substantially less underdrain on a project than was estimated in the bid schedule is almost conclusive evidence that conditions were better than anticipated.³⁵ In the present case, the fact that the appellant placed only 2097.2 linear feet of underdrain in the Hazel Wood cut and that a total of 2866.1 feet was placed on the entire project is evidence that conditions actually encountered were approximately what had been anticipated when the contract was awarded. We are not persuaded by the appellant's evidence that a reasonable study of the contract documents and an adequate inspection of the site would not have alerted the contractor to the existence of conditions substantially similar to those forming the basis of the present claim. We find that the appellant could not reasonably have anticipated a sequence of work unimpeded by placement of underdrain and that conditions were not changed when it became necessary to place such underdrain in an

amount less than that estimated in the contract.

The claim is therefore denied.

Claim K

The appellant alleged that the Government failed to provide and allow detours for county crossroads at Stations 242, 179 and 19+10, thus requiring the appellant to perform extra work.

Page D-1, Special Provisions of the Contract, provides as follows:

Section 4.—Scope of Work. 4.3 is amended and supplemented as follows: The parkway will be closed to public traffic. The construction and later obliteration of detour roads will be paid for at the contract unit prices for the pay items involved.

FP-61, Article 4.3 states the following:

4.3 Construction and Maintenance of Detours. Any existing road, while undergoing improvement, shall be kept open to traffic by the contractor, provided that when approved by the engineer or indicated on the plans or in the special provisions the contractor may bypass traffic over a detour. The contractor shall keep the entire length of road under contract or the detour, as the case may be, continuously in such condition that traffic will be adequately accommodated during the entire contract period. The contractor shall provide and maintain in safe condition temporary approaches and crossings and shall keep open and safely passable intersections with trails, roads, and highways; provided, however, that snow removal will not be required of the contractor for accommodation of traffic. The contractor shall bear all the expense of constructing and maintaining such roads, detours, approaches, intersections, and any accessory features without direct compensation, save as provided below. * * *

³⁵ *Service Construction Corp.*, IBCA NO. 678-10-67 (January 12, 1970), 70-1 BCA par. 8068.

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On pages 10, 16 and 17 of the plans, relocations of the county roads in question are shown, together with a note on each of the existing county roads which states:

Existing County Road to be obliterated after³⁰ completion of Box Bridge.

The only temporary detour shown on the plans (page 9) is not involved in this claim.

Mr. Caldwell testified that failure of the Government to approve detours at the three stations indicated was one of the major delays on the job (Tr. 339). The cut at Station 236 could not be completed while the existing county road remained in place (Tr. 343). The bridge for the relocation at Station 242 was completed on May 16, 1964 (Tr. 341). The fill at Station 179 could not be completed while the county road remained (Tr. 348-50). The structure for the relocation of this road was completed on May 9, 1964 (Tr. 350). Mr. Caldwell attached less importance to the problems encountered at the fill at Station 19+10. In view of previous delays there was very little delay or damage there (Tr. 409-10). Mr. Caldwell stated that the relocated crossroad at Station 242 was completed on September 8, 1965 and all three relocated crossroads were finished before the winter season. He also stated that his subcontractor for concrete worked ahead of the grading operation, excavated for bridges, and created a situation where water would accumulate unless a drainage ditch were cut. Be-

fore grading could proceed, some preparation had to be made to pump out the water and give the area time to dry (Tr. 946).

Mr. Caldwell testified that he first discussed the problem of detours with Mr. Grant in June 1964 (Tr. 406-07). Although he was denied permission to build detours, he did not submit a written request for approval of the detours (Tr. 651). At the hearing, Mr. Caldwell drew sketches of the detours he would have built at Stations 19+10 and 236 if he had been granted permission (Govt. Exhibits I and J; Tr. 1301-02).

Mr. Grant stated that he received no request for a detour (Tr. 2216) but if the request for the detours shown in Mr. Caldwell's sketches had been presented to him, he would not have granted permission to build them, since he considered the sketches showed solutions that were not feasible from an engineering standpoint or were dangerous (Tr. 2217-30).

Mr. Grant stated that the situation at the county road at Station 179 did not require a detour, since the appellant was allowed to build a ramp as high as he built his fill in 1964 in order to maintain traffic and the relocated road was graded and traffic turned on it in 1965 before any further work was done on the fill (Tr. 2216). The appellant would probably have been allowed to increase the height of the ramp if the fill had been built higher but the matter wasn't even discussed (Tr. 2216-17, 2229).

³⁰ On Sheet 10 of the plans the word "upon" is used in lieu of the word "after."

Mr. Grant testified that the purpose of including relocations of the county crossroads in the design of the parkway was to permit traffic to be maintained during construction (Tr. 2218-19).

He stated the normal sequence of operations would have been to grade the county road first, then build the bridge (Tr. 2219-22, 2235). At Station 242, the bridge subcontractor dug a hole and built the bridge before the county road was graded. No drainage was provided and water and mud accumulated to a depth of about a foot inside the box bridge (Tr. 2233). The drainage which was provided in 1965 to enable completion of the county road could have been accomplished as easily in 1964, according to Mr. Grant (Tr. 2234). Mr. Grant averred that no effort was made to finish the county roads in 1964, which he attributed to poor planning (Tr. 2219-22).

Decision

It is axiomatic that a contract should be considered as a whole, with all parts of the contract being interpreted together.³⁷ When the requirement in FP-61, Section 4.3 that existing roads shall be kept open and passable is read in conjunction with the notes on pages 10, 16, and 17 of the plans that existing county roads are to be obliterated after completion of the box bridges, the only conclusion warranted appears to be that the relocated county

roads, as well as the box bridges, must be completed before obliteration of the existing county roads. Supporting this view is the fact that the plans make no provision for temporary detours at those locations.

The Government was entitled to have the relocations of the county roads built to maintain traffic without the necessity for the additional expense of temporary detours to serve the same purpose. The burden was on the appellant to show sufficient reason for deviating from the method of construction apparently contemplated by the contract as well as by the normal sequence of construction. Both Mr. Caldwell and Mr. Grant agreed that the construction of the bridge at Station 242 ahead of the grading operation, without providing drainage in the area, caused a condition which interfered with construction. Such a condition is clearly not attributable to the Government since the sequence of operations was under the control of the appellant.

With respect to the situation at Station 179, the appellant's conduct was not consistent with the assertion that this was a major problem. The appellant did not submit a written request for a detour and the record reveals no attempt to reverse the alleged oral refusal of permission for a detour at that location. In view of Mr. Grant's testimony that a detour was not necessary and that a ramp would have been allowed as high as the appellant cared to construct the fill, it appears that there

³⁷ *Lane Co., Inc. v. United States*, 193 Ct. Cl. 203 (1970).

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was no delay attributable to the Government at Station 179.

According to the unrefuted testimony of Mr. Grant, the appellant did not produce a feasible proposal for a detour in Exhibit J. We conclude that the most feasible method of proceeding at Station 19+10 would have been for the appellant to construct the relocated county road in accordance with the plans.

We find that the appellant has not sustained its burden of proof with respect to this claim.

The claim is therefore denied.

Claim L

The appellant alleges that during the period July 11 to July 27, 1966, when no trucks were available on the project, it was not allowed to substitute scrapers for hauling plating material over the topping already in place from Station 242 to 285, thereby causing extra work for which it is entitled to an equitable adjustment.

Mr. Caldwell testified that trucks were absent from the project from June 15 to July 26, 1966, due to a truck driver's strike (Tr. 895). Although he had not planned to use scrapers to haul plating material from the lagoon borrow pit at Station 215, he did plan to use scrapers beginning on July 11, 1966, but was told he couldn't do so by Mr. Allen (Tr. 896). Mr. Caldwell stated that there is no spillage of material out of the scraper or off its tires after 100 feet from the point where it is loaded and he saw no reason for

denying permission to use the scrapers (Tr. 900).

Mr. Grant testified that from years of experience he had found that there is considerable spillage from scrapers, particularly with wet material such as that from the lagoon pit, and not just within a short distance of loading. In addition, Mr. Grant expressed the view that the bouncing impact of the heavily loaded scrapers would cause hidden damage to materials under the one foot topping layer (Tr. 2335).

Decision

We note that it was the absence of trucks on the project which caused the appellant to seek to use scrapers for hauling the plating. The decision to deny permission to use scrapers to haul plating material over topping material already in place appears to have been based on substantial considerations for protection of the roadway.³⁸

Accordingly, the claim is denied.

Claim M

The appellant alleged that it performed roadside cleanup for which it was not paid as provided in the unit price schedule of the contract.

Pay Item No. 112(1) of the contract sets forth an estimated quantity of 50 acres of roadside cleanup at \$40 per acre.

Mr. Caldwell testified that he compiled the figures set forth on

³⁸ See Mr. Grant's letter of July 18, 1966 (Appeal File, Volume II).

page 45 of the claim brief of June 28, 1968 (Volume II, Appeal File) which showed his estimate that roadside cleanup for 30.44 acres was 95 percent complete at the time of termination of the contract (Tr. 881-82). He stated that the figures were compiled mostly from memory and if he had any doubt, he put it down in the belief that the engineers would have records to show if he was wrong (Tr. 881).

Mr. Grant testified that the project diaries (Government Exhibit JJJ) show six days when some type of roadside cleaning took place (Tr. 2339). The dates were September 15, 16 and 17, 1965, and April 8, 9 and 12, 1966. Mr. Grant conceded that the appellant possibly did some picking up of the larger debris (Tr. 2340).

Mr. Allen testified that he found only two days when what he would consider roadside cleanup occurred, on May 18 and 19, 1965 (Tr. 2808-09).

Decision

Examination of the project diaries kept by Mr. Allen discloses that cleanup designated variously as minor, miscellaneous, or cleaning up debris took place on the dates noted by Mr. Grant. Roadside cleanup occurred on May 18 and 19, 1965 as Mr. Allen stated.

We find that roadside cleanup occurred to some extent on the six days noted by Mr. Grant and the two days noted by Mr. Allen, as shown by Mr. Allen's project diaries. The incomplete nature of the record precludes a finding as to the number of

acres involved or the degree of completion of the roadside cleanup for those areas.

In view of the nature of the work, it does not appear that roadside cleanup is dependent on any other construction operation. We therefore find that no extension of time is warranted for the time spent in roadside cleanup and that the amount of compensation to be allowed rests solely upon the number of acres cleaned up and the degree of completion accomplished.

The claim is allowed to the extent indicated.

Claim N

The appellant alleged that the average haul of material from borrow pits increased from its original estimate of 1,195 feet to an actual average haul of 4,680 feet.³⁹ The appellant attributed this increase to the Government's refusal to approve bottom land pits for Case 2 borrow, the unexpected amount of undercut directed to be performed, the unexpected unavailability of the Hazel Wood property as a source of A-2 material and the Government's requirement that material in the cut at Station 65 be hauled toward the available borrow pit.

Mr. Caldwell testified that the borrow on this project had a pay item only for the yardage used and it was necessary for a bidder to determine an average haul in order to establish a price for the borrow (Tr. 801-02). The borrow primarily

³⁹ Appeal File, Volume II, Claim Brief of June 28, 1968, p. 46.

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in question is the Case 2 borrow shown on the bid sheet as involving 330,000 yards (Tr. 802). Mr. Caldwell stated that he did not keep his original calculations, but he reworked his calculations and obtained a figure of 1,195 feet for the average haul for borrow (Tr. 802). Mr. Caldwell offered appellant's Exhibits 20 and 21 in support of his computation, although he stated that Mr. Pugh prepared the exhibits and did some of the calculations under his direction. The computations were made in the spring of 1968 (Tr. 810-12). Mr. Caldwell stated that the increased average haul occurred from August 11, 1965 through the default date, March 1, 1967 (Tr. 835-36). He testified earlier that he based his bid for A-2 topping material on a quotation from Mr. John H. Moon who offered to deliver the material to the site for \$1.15 per cubic yard and his bid of \$1.25 per cubic yard included ten cents per yard to place the material on the road (Tr. 221).

Mr. Grant testified that he did not refuse to approve a bottom land pit or any other pit if the material met the specifications. He stated that the appellant could have placed common borrow or the specified A-4 borrow at any time the road was ready to receive it and if the appellant could make arrangements for material meeting the specifications for borrow (Tr. 2342).

Decision

This claim, insofar as it relates to the alleged refusal of the Gov-

ernment to approve bottom land pits for borrow, is governed by our finding under Claim I that the appellant failed to prove that the Government refused to approve borrow which met the specifications (Pages 46 and 47, *supra*).

The allegation of an unexpected amount of undercut directed to be performed is apparently based on excavation for the 2 foot 4 inch layer of plating which Mr. Caldwell referred to as undercut throughout the hearing. However, in view of the cross section on page 4 of the plans (Volume I, Appeal File) which shows the 2 foot 4 inch layer, we find that such excavation, whether described as undercut or otherwise, is not unexpected but typical.

Whether or not the Hazel Wood property was available as a source of A-2 material is irrelevant in view of Mr. Caldwell's testimony at Tr. 221 that his bid for A-2 material was actually based on another source.

The provisions of section 102-1.3(e), FP-61 are clear and unambiguous in placing the responsibility for selecting borrow pits for Case 2 borrow on the contractor and in providing that the contractor shall bear the expense of handling, hauling and placing the material. Mr. Caldwell acknowledged this contractual provision when he testified that borrow is paid for only by the yard (Tr. 801) but he advanced no contractual basis for avoiding the effect of such provision. Section 105-1.1, FP-61, specifically excludes Case 2 Borrow from payment for

overhaul as contained in Pay Item No. 105(1).⁴⁰

We find no basis in the record for concluding that the appellant is entitled to additional compensation for whatever increase in average haul occurred over what may have been anticipated.

Accordingly, the claim is denied.

Claim O

Claim O was withdrawn by the appellant (Tr. 2196).

Claim P

The appellant alleged that the Government unreasonably delayed approval of its concrete subcontractor, for which it is entitled to an equitable adjustment of one day of contract time.

The project diary maintained by Mr. Grant discloses that appellant moved one bulldozer to the bridge site at Station 202+50 on October 24, 1963 and began clearing the site. The proposed concrete subcontractor moved some concrete forms and a dragline to that station on the same date but did no work. Excavation for the bridge by the proposed subcontractor began on October 25, 1963 (Government Exhibit JJJ).

Mr. Caldwell's letter dated October 19, 1963, requesting approval of the concrete subcontractor was stamped as received by the Bureau of Public Roads on October 28, 1963 (Government's Exhibit C). The letter approving the subcontractor

was dated October 29, 1963 (Appeal File, Volume II).

On this record, we find that the concrete subcontractor was not delayed by the fact that the letter of approval was sent on October 29, 1963, since the clearing work in the area in question had not been completed when the concrete subcontractor moved some equipment on the job site on October 24, 1963. Moreover, the appellant failed to submit a timely written request for approval⁴¹ of the proposed subcontract.

The claim is denied.

Claim Q

The appellant alleged that a strike of truck drivers occurred in June and July of 1966, which was beyond its control and without its fault or negligence, and for which it is entitled to a time extension of twenty-six days.

Mr. Caldwell testified that he made an agreement with Mr. Huey Stockstill to haul borrow material, under which Mr. Stockstill and his truck drivers were to be placed on the appellant's payroll but Mr. Stockstill would use his own equipment (Tr. 883). It was Mr. Cald-

⁴¹ Although the preconstruction conference was held on October 11, 1963, the appellant's written request to approve John H. Moon & Sons as a subcontractor was not submitted until October 19, 1963 (i.e., some 8 days later). Action by the Government within one day of the receipt of the written request on October 28, 1963, corroborates the Government's statement at the preconstruction conference that an investigation of Moon would not be necessary. See page 47, of claim brief of June 28, 1963 (Appeal File, Volume II).

⁴⁰ Appeal File, Volume I, the Contract.

well's opinion that because of difficulties related to the availability of borrow and the wetness of the pits, Mr. Stockstill was not taking in enough money to finance his operation (Tr. 883-86). None of the trucks and drivers showed up for work on June 15, 1966 (Tr. 886-87). When Mr. Caldwell inquired about the reason, he was told that the drivers were not getting enough time and they were going to other work (Tr. 887). Mr. Caldwell stated that he "threatened him (Mr. Stockstill) pretty heavy" and five of the six drivers returned to work and remained until June 22, 1966, when they stopped work for about two hours, complaining of dusty conditions (Tr. 888). Mr. Caldwell stated he did not believe the drivers struck because of the dusty conditions but rather they were looking for an excuse to leave (Tr. 888-89). Mr. Caldwell did not testify as to the date when Mr. Stockstill's trucks and drivers finally left the job, but he stated that he was able to make other arrangements and get trucks back on the job by July 26, 1966 (Tr. 895).

Decision

The well-established definition of a strike is that it is a combined effort on the part of a body of workmen to enforce a demand on their employer by stopping work in a body and refusing to return to work until the demand is met. *National*

Labor Relations Board v. Illinois Bell Tel. Co., 189 F.2d 124 (7th Cir. 1951). Conversely, it is not a strike if employees quit work collectively without any intention to return to the employment, whatever their motivating reason for so doing may have been.⁴²

In the present case, the truck drivers advised they were going to other work after their initial failure to appear on the job. Their return under duress and their subsequent departure after complaining of dusty conditions are regarded as action taken in furtherance of their intention announced earlier to go to other employment.

Based upon the evidence of record, we find that no strike existed; nor is there anything in the record to indicate that the case presented can otherwise be regarded as constituting an excusable cause of delay. The situation confronting the appellant between June 15 and July 26, 1966, was simply that he was unable to retain or replace the truck drivers and trucks required for the performance of the contract work. The rule is well established, however, that the contractor's bid is an unqualified representation that the contractor has the supervision, personnel, equipment, skill and ability to do the contract work.⁴³ The con-

⁴² See *Deshler Broom Factory v. Kinney*, 2 N.W. 2d 332, 334 (Neb. 1942).

⁴³ *American Ligurian Co., Inc.*, IBCA-492-4-65 (January 21, 1966), 73 I.D. 15, 22, 66-1 BCA par. 5326, at 25,028.

tractor's responsibility in these respects is a continuing one.⁴⁴

The claim is therefore denied.

Claim R

The appellant alleged that it encountered a telephone cable under the access connection to the airport road which was not anticipated and which was not shown in the contract documents or plans. Appellant requested an extension of twelve contract days for the period June 17, 1966 to July 2, 1966, when it was unable to proceed with what it has described as controlling items of work.⁴⁵

Mr. Caldwell testified that the unexpected encountering of the telephone cable meant that for a distance of 200 to 250 feet beside the pavement of the airport road work could not proceed as planned (Tr. 914-16). Mr. Caldwell's testimony did not indicate that operations in any other area were delayed (Tr. 913-18) and he stated that the delay involving relocation of the telephone cable overlapped the delay caused by the absence of truck drivers (Tr. 916; Claim Q, *supra*).

Mr. Allen testified that the relocation of the cable limited the appellant's operation only in a ten to

fifteen foot area adjacent to the airport road and that access roads nearby were fine-graded during the period in question (Tr. 2833-37).

Decision

Examination of the project diaries (Government's Exhibit JJJ) discloses that the appellant was performing other grading operations during the period in question on the days when the weather and ground conditions permitted. Based upon the testimony narrated above and the information contained in the project diaries, we find that the appellant has failed to show that the restriction of its operations in the area of the telephone cable had any effect on the overall progress of the job.

The request for an extension of time is therefore denied.

Claim S(1)

The appellant alleged that due to the Government's unreasonable requirements and restrictions, interference in the progress of the work, wrongful control of the progress of the work and the extra work required to be performed, it is entitled to an equitable adjustment of 261 days.

This claim is essentially a combination of claims A through R, expanded and illustrated by a critical path chart (Appellant's Exhibit No. 25) to show a relationship between the various claims. Mr. Caldwell testified that the critical path chart was prepared in the fall of 1967 from his memory and what few

⁴⁴ *Duralab Equipment Corporation*, GSECA No. 3412-R (July 10, 1972), 72-2 BCA par. 9571, at 44,591 ("* * * It is not the Government's burden to prove that Appellant was able to foresee a continuing labor problem with draftsmen. As our initial decision clearly spelled out, it was Appellant's responsibility, when it submitted its bid on the project, to see to it that it would have adequate staffing to do the required work.")

⁴⁵ Appeal File, Volume II, Claim Brief of June 28, 1968, pp. 50-51.

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notes and markings he had made on the plans and from conversations that he could recall as to what he generally planned to do (Tr. 957). Mr. Caldwell stated that generally the critically path chart represented his thinking at the time of bidding, but not in every case since he did not know how to make such a chart at that time (Tr. 959-60). He further stated that the critical path chart "assumes that the contractor is solid gold, that he is doing exactly what he is supposed to do" (Tr. 1007-08).

The request for an extension of contract time is based on the Government charging time against the contract on days when no work was performed on critical path items (Tr. 1000-05). Mr. Caldwell alleged that in section one of the critical path chart (Appellant's Exhibit 26) the Government charged 171 contract days from February 4, 1964 through August 31, 1964, while only 27 days were actually worked on critical path items (Tr. 1000-01).

In explaining why this request started on February 4, 1964, Mr. Caldwell testified as follows:

That's the first time—the first point in the job that we felt like—it happens to be the completion date of the structure at 89, and that was our first critical item. We feel like that's the first place that we are entitled to ask for an increase. In other words, time charged under structure at 78 and the time before it was started, we feel like we could have started it sooner or we could have completed it a little sooner. So, we didn't feel like any of the Government's claims were effective during that period. (Tr. 1005.)

Mr. Banks testified that a critical path is of no value unless it is prepared beforehand and an honest effort is made to follow it during construction and unless provisions are made to get back on the critical path when operations have fallen behind schedule (Tr. 1837-38). Mr. Banks pointed out that the plan of operation submitted by Mr. Caldwell on November 11, 1963, was not a critical path plan and was stated in the most general terms (Tr. 1837). The primary consideration in preparing a critical path chart is to determine the sequence of activities for each activity that is dependent on some previous activity, but Mr. Banks stated that there were numerous occasions in the appellant's critical path charts where there was no indication that the proper sequence had been considered (Tr. 1837). For example, Mr. Banks noted that the appellant's critical path charts showed the beginning of fills to be dependent on the completion of bridge or culvert structures, whereas most of the fills could be placed as the structures were built (Tr. 1838-39). Mr. Banks was unable to check Mr. Caldwell's assumptions on which the critical path chart was based (Appellant's Exhibit 32) due to insufficient information as to the basis for the assumptions (Tr. 1840).

Decision

We are not prepared to accept Mr. Caldwell's assumption that the contractor was "solid gold" and was doing exactly what he was supposed

to do. Mr. Stinson testified that no fine grading was performed in 1964 and that no drilling for A-4 borrow material was performed until after the winter shutdown in 1964 (Tr. 2056-57), which was too late to obtain material from the bottom lands flooded before the beginning of construction in 1965. Mr. Giles testified that he did not have enough equipment to do the job and he requested Mr. Caldwell to furnish more equipment in 1965 so that the project could be completed on time, but was told that the appellant's equipment was in use on other projects and not available at that time (Tr. 2996-97). Such testimony on the part of two men who were employed in supervisory capacities by the appellant tends to negate Mr. Caldwell's assumption that the contractor was "solid gold" and was doing exactly what he was supposed to do.

Mr. Caldwell's testimony concerning his "feeling" that the Government's time computation was not effective after February 4, 1964, affords no factual basis for a conclusion that contract time should be charged for critical path working days rather than for calendar days as set forth in the contract.⁴⁶ We find that the appellant has not sustained the burden of proving that a critical path chart compiled after termination of appellant's contract constitutes a proper basis for computation of contract time.

In determining the equitable adjustment of contract time to which

the appellant is entitled, the contracting officer will be governed by our finding of liability on the part of the Government with respect to Claims A, B, C and E, *supra*.

Claim S(2)

This claim is an expression of the total claim for an equitable adjustment in terms of dollars. The hearing was limited to the issue of liability, with the issue of quantum reserved by agreement of the parties. Consequently, no finding as to this claim is appropriate and none is made.

Termination of Contract

The appellant also alleged that its right to proceed was wrongfully terminated by the Government. In addition, the appellant denied any responsibility for excess costs and contested the propriety of the liquidated damages assessed by the Government for delayed performance. Based upon the position so taken, the appellant asked that it be paid immediately the amount of the earnings retained (\$145,472.36) and the amount allowed in the contracting officer's decision in Claim E (\$2,607).

We note that the basis for termination for default⁴⁷ of the appellant's right to proceed with the contract work was the finding by the contracting officer that the appellant had failed to prosecute the work with such diligence as to insure completion within the time authorized

⁴⁶ FP-61, Section 8.6, Contract Time and Section 8.7, Suspension of Work.

⁴⁷ Appeal File, Volume II, letter of March 1, 1967.

by the contract. The letter stated that the contract work was 63% complete and the contract time was overrun by four days as of January 15, 1967.

The allowance of contract time for the liability found to be present with respect to Claims A, B, C and E above will necessarily extend the completion date beyond the date contemplated at the time of the notice of termination for default.

While there is a serious question as to whether the time extension to which the appellant may be entitled by reason of the findings made herein as to liability,⁴⁸ we cannot exclude the possibility that the proof offered by the appellant may convince the contracting officer that the termination for default was improper. Accordingly, we defer our decision on the question of the propriety of the default termination pending a determination by the contracting officer of the time extension to which the appellant is en-

titled under the guidelines established in this opinion. We therefore also defer any decision with respect to the Government's claim for excess costs and liquidated damages.

SUMMARY

1. To the extent indicated in the opinion, the Board has found for the appellant on the question of liability with respect to Claims A, B, C, E, and M.

2. The equitable adjustment in time or money to which the appellant is entitled under the guidelines established in the opinion, *supra*, shall be determined by the contracting officer on the basis of the evidence of record or such additional evidence as the contracting officer shall request or the appellant shall submit within ninety days of the date of receipt of this opinion by appellant, or such additional time as shall be mutually agreed upon.

3. In the absence of mutual agreement as to particular claim items, the contracting officer shall make findings of fact as to the equitable adjustments to which the appellant is entitled by reason of this opinion from which a further appeal may be taken to the Board.

4. No final determination has been made as to the propriety of terminating the contractor's right to proceed for default or as to the appellant's liability for the excess costs claimed by the Government pending the contracting officer's determination of the additional time to which the appellant is entitled by

⁴⁸ We note, for example, that if the time extension figures used in the claim brief of June 28, 1968 (Appeal File, Volume II), were to be accepted as determinative of the maximum extension in time to which the appellant is entitled by reason of the claim items for which liability was found to exist (Excluding Claim M for which no time extension was granted) the total entitlement for time extension would amount to only 71 days even if no adjustment were to be made for the fact that total liability was not found to be present. We also note, however, that with respect to Claim E the Government conceded at the hearing that the contractor was entitled to drying and processing costs on 15,140 square yards over and above the 23,700 square yards for which compensation was found to be due by the contracting officer (i.e., an increase of 63%) and that in a number of instances the Government allowed more square yards for drying and processing in the cuts than the appellant had claimed.

reason of the Board's findings, *supra*.

5. Except as hereinbefore expressly granted, the appeal is denied.

G. HERBERT PACKWOOD, *Member*.

WE CONCUR:

WILLIAM F. MCGRAW, *Chairman*.

SHERMAN P. KIMBALL, *Member*.

GATEWAY COAL COMPANY

2 IBMA 107

Decided *May 30, 1973*

Appeal by Gateway Coal Company from a decision by Administrative Law Judge M. P. Littlefield (formerly "Hearing Examiner") denying a petition for modification of application of mandatory automatic fire detection and suppression safety standards in section 311 of the Federal Coal Mine Health and Safety Act of 1969 and implementing regulations.

Reversed and modification granted in part.

Federal Coal Mine Health and Safety Act of 1969: Modification of Application of Mandatory Safety Standards: Waiver of Participation

Where a party has had *actual notice* of all proceedings relating to a petition for modification of a mandatory safety standard and elects not to participate, he shall be deemed to have waived any objection to the petition.

Federal Coal Mine Health and Safety Act of 1969: Modification of Applica-

tion of Mandatory Safety Standards: Publication

Where a proposed modification is amended subsequent to publication in the *Federal Register*, strict compliance with the provisions of section 301(c) of the Act requires republication of the new proposal.

Federal Coal Mine Health and Safety Act of 1969: Modification of Application of Mandatory Safety Standards: Stipulations

A stipulation of facts and conditions arrived at after extensive consultation and study by technical experts of the parties, in the absence of objection, and with agreement of the Bureau that the proposal will guarantee not less than the same measure of protection as the mandatory standards, shall be sufficient to support a grant of a modification of the application of mandatory standards.

APPEARANCES: Daniel R. Minnick, Esquire, for appellant, Gateway Coal Company; Robert W. Long, Associate Solicitor, J. Philip Smith, Assistant Solicitor, I. Avrum Fingeret and Bernard M. Bordenick, Trial Attorneys, for appellee, U.S. Bureau of Mines.

OPINION BY THE BOARD INTERIOR BOARD OF MINE OPERATIONS APPEALS

Factual and Procedural Background

Gateway Coal Company (Gateway) has appealed a decision by the Administrative Law Judge denying Gateway's petition for modification of the application of certain mandatory fire safety standards to Gateway Mine. Specifically, Gateway

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requests modification of the application of sections 311(f) and 311(g) of the Federal Coal Mine Health and Safety Act of 1969 (the Act)¹ and the regulations prescribed in 30 CFR 75.1100-1(f), 75.1101-1 through 75.1101-22, and 75.1103-1.² These standards all relate to automatic fire detection or suppression in underground coal mines.

Gateway originally filed a petition in May 1970 and requested modification of the application of 30 CFR 75.1100-2(b), which then required 150 feet of rubber-lined firehose at each firehose outlet along a belt conveyor entry.³ 35 F.R. 5247. Notice of the petition was published in the *Federal Register* in compliance with section 301(c) of the Act, on October 21, 1970. No comments were received as a result of such publication. On December 10, 1970, Gateway amended its petition to include a request for modification of the application of

sections 311(a),⁴ (f), and (g) of the Act, 30 CFR 75.1100-1(f), 30 CFR 75.1101-1 through 75.1101-22, and 30 CFR 75.1103-1. The amended petition applied to the entire belt-conveyor system in Gateway Mine. The alternative proposed by Gateway to the mandatory standards was the fire suppression and prevention system then installed in the mine.

A full evidentiary hearing was held and on October 15, 1971, the Administrative Law Judge issued a decision denying Gateway's petition. The Judge's decision was appealed to this Board in November 1971, and an oral argument was held. At the oral argument, the parties agreed to attempt to reach a stipulated settlement of the case, and the Board for that reason held the case in abeyance.⁵ Counsel and the technical experts for the parties met over the next ten months and, on September 8, 1972, filed a proposed stipulation with the Board. The Board, finding the stipulation incomplete and unclear, informally met with the parties and suggested that the stipulation be redrafted. On January 12, 1973, a revised stipulation was filed.

¹ P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

² Gateway's request as to the mandatory standards which require installation of automatic fire sensors is limited to section 311(g) of the Act and 30 CFR 75.1103-1. On February 12, 1973, additional sub-parts to this section became effective, which prescribe the components and standards of performance required for the automatic sensors. 37 F.R. 16545. The modification that is granted for 30 CFR 75.1103-1 includes modification of the application on these new sub-parts, 75.1103-2 through 75.1103-10.

³ This section has been amended since the petition was originally filed so that 500 feet of hose is now required. In fact, several of the regulations involved in this proceeding have gone through changes since the case began. The modification granted herein by the Board pertains to the mandatory safety standards in effect at the time of the Board's order herein.

⁴ Section 311(a) is the broad general statutory provision relating to fire protection. The request for modification of this section has been abandoned by Gateway, and in light of our grant of modification of more specific sections of the Act and related mandatory standards, we do not believe a modification of this general section is appropriate and no further reference thereto will be made.

⁵ The Board did decide a consolidated cross-appeal filed by the Bureau involving an application for review of notices of violation issued for Gateway Mine while the petition for modification was pending. *Gateway Coal Company*, 1 IBMA 82, 79 I.D. 102 (1972).

By virtue of the present stipulation, Gateway has limited its request for modification to the belt drives on the main and secondary belts. It has agreed to maintain the present firefighting system, to install hoses meeting the length and flow requirements in the regulations, to station a man at any belt drive when the television camera, which normally monitors the drive, is not operative, and to install automatic fire-suppression devices at the butt belt drives.⁶

On January 13, 1973, the Bureau in reply to Gateway's specific request for relief restated its agreement to the modification of the application of all of the above mandatory standards except 30 CFR 75.1100-1(f). Therefore, the parties' sole disagreement is whether Gateway may install, in areas where water pressure is in excess of 150 p.s.i., firehoses with less than the hose-bursting ratio required by 30 CFR 75.1100-1(f).

Since notice of Gateway's original petition for modification was published in the *Federal Register* on October 21, 1970, both the Gateway request and the pertinent regulations have been amended. Following the filing of the revised stipulation of the parties the Board concluded that strict compliance with the provisions of section 301(c) of the Act required republication in the *Federal Register* of the Gateway proposal as amended. On

March 1, 1973, there was published in the *Federal Register* notice of the amended petition together with the stipulation filed by the parties on January 12, 1973, 38 F.R. 5485. The notice provided that parties interested in Gateway Coal Company's amended petition and the stipulation, should file comments or request a hearing within 30 days of publication. The notice further stated that in the absence of objection or necessity for further hearing the Board proposed to render its decision based upon consideration of the stipulation and the record in the proceeding. The only comment filed with the Board as a result of this publication was from the United Mine Workers of America (UMWA), the representative of the miners.

On April 2, 1973, the UMWA, pursuant to this notice and section 4.552 of the regulations filed an opposition to the amended petition of Gateway. UMWA alleged generally that the Gateway proposal does not meet the specific provisions of section 301(c) of the Act and "demands strict proof as to the condition and operation of the mine here involved * * * and as to the reasons for the proposed modification of or exception from the mandatory safety standards" and requested a public hearing on the matter pursuant to the provisions of section 301(c) of the Act. Both Gateway and the Bureau of Mines filed replies to the opposition of UMWA. Gateway and the Bureau allege that UMWA at this late stage in the proceeding

⁶ Gateway has withdrawn the petition in relation to the butt belts, and consequently has agreed to comply with the fire-suppression standards for the butt belts.

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has waived its right to request any further evidentiary hearing on this matter. In support of their opposition they point out that UMWA has been served with all pleadings and documents in this proceeding (including the original and final stipulations of the parties) and has had actual notice of all proceedings before the Hearings Division and this Board. UMWA's only response in the entire proceeding was an answer filed in the proceeding in October 1970. UMWA failed to appear at any of the hearing sessions; failed to send representatives to conferences held for the purpose of discussing the requested modification; and failed to submit either comments or objections to the proposed stipulation. The Bureau points out that the purpose of the *Federal Register* publication is to give notice to "other interested parties" to enable them to comment or participate. It is further urged that since UMWA has had *actual* notice of all proceedings and had the opportunity to actively participate in all phases of the case, it cannot now be heard to request that the entire proceeding be reopened for a new hearing. Gateway observes that UMWA has raised no objection to any specific stipulated fact or made any specific comments on the proposal.

The Board is persuaded by the arguments of the Bureau and Gateway and is disinclined to reopen the hearing in this proceeding. The record is clear that UMWA has had actual notice of all proceedings before the Administrative Law Judge

and this Board and that its nonparticipation has been of its own choosing. The time has come to conclude this litigation. Therefore, the Board will deny the request of UMWA for reopening of the record and for further hearing.

DECISION

It is significant that throughout this proceeding the Bureau has recognized that Gateway Mine is generally known as a well-operated, safe mine. It is also significant that the representative of miners (UMWA) elected not to participate in the proceeding after filing an answer opposing the May 1970 petition, and that no comments were filed by any other person as a result of the publications in the *Federal Register*. Finally, it is most significant that, after extensive consultation and study, the Bureau's technical experts on mine safety agree that the alternative proposed by Gateway will guarantee no less than the same measure of fire protection as the mandatory standards.

For these reasons, and based upon a review of the hearing record and the stipulation of the parties, the Board concludes that Gateway has established that it is entitled to the modification it seeks, with the exception of the requested modification of the application of 30 CFR 75.1100-1(f)(1). The parties have not stipulated as to this standard, and there is no evidence in the record to support a finding that the alternative proposed by Gateway

will meet the standard of safety required by section 301(c). Therefore, the Board makes the following findings of fact:

1. Gateway has installed in Gateway Mine a belt system and fire detection and suppression system described in paragraphs numbered 1-41 of the attached appendix, entitled, "Stipulations of fact."

2. Gateway has agreed to maintain the above-described system.

3. Gateway has agreed to add to the system: (a) at each belt drive, 500 feet of firehose capable of delivering to the belt drive 50 gallons of water per minute at 50 pounds pressure per square inch at the hose nozzle; (b) a fire-suppression system at the butt belt drives that will comply with 30 CFR 75.1101 *et seq.*; (c) a man to be stationed at any transfer point or belt drive where the television monitor is malfunctioning.

4. Gateway has established an alternative method for achieving on the main and secondary belt drives of Gateway Mine no less than the same measure of protection afforded the miners by the standards of sections 311(f) and 311(g) of the Act, 30 CFR 75.1101-1 through 75.1101-22, and 30 CFR 75.1103-1 through 75.1103-10.

Based upon the foregoing findings of fact, the Board concludes that Gateway Coal Company is entitled, with respect to Gateway Mine, to modification of the application of sections 311(f) and 311(g) of the Act, 30 CFR 75.1101-1 through 75.1101-22, and 30 CFR

75.1103-1 through 75.1103-10 for the belt drives on the main and secondary belts, conditioned upon compliance with the stipulation of the parties filed January 12, 1973, a copy thereof being attached hereto as an Appendix p. 387.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that:

1. Gateway Coal Company's petition for modification of the application of the mandatory standards of sections 311(f) and 311(g) of the Act and 30 CFR 75.1101-1 through 75.1101-22, and 30 CFR 75.1103-1 through 75.1103-10 for the belt drives on the main and secondary belts at Gateway Mine IS GRANTED conditioned upon compliance with the terms and conditions of the stipulation of the parties attached hereto and made a part hereof;

2. Gateway Coal Company's petition for modification of the application of 30 CFR 75.1100-1(f) IS DENIED;

3. The request of the United Mine Workers of America for reopening and for further hearing IS DENIED;

4. This decision is effective immediately except that Gateway Coal Company will have a period of sixty (60) days from the date hereof to install firehoses capable of delivering a minimum of 50 gallons of water per minute at 50 p.s.i. to the

belt-drive equipment, which period of time may be extended by the Bureau of Mines if in its judgment circumstances warrant such extension;

5. A copy of this decision shall be served immediately upon the representative of miners at the Gateway Mine by a representative of the Bureau of Mines pursuant to the provisions of section 301(c) of the Act;

6. Pursuant to the provisions of section 107(a) of the Act the Gateway Coal Company shall immediately post a copy of this decision on the Gateway Mine bulletin board; and

7. Pursuant to the provisions of section 107(b) of the Act the Bureau of Mines shall immediately mail a copy of this decision to the official of the Commonwealth of Pennsylvania charged with the responsibility for administering that State's coal mine health and safety laws.

C. E. ROGERS, JR., *Chairman.*

DAVID DOANE, *Member.*

APPENDIX

STIPULATIONS OF FACT

1. Gateway Mine is located in the Pittsburgh seam in Greene County, Pennsylvania. Coal is conveyed along approximately twenty (20) miles of belt from the working places to the tippie.

2. The main and face belts (hereinafter referred to as "belt") were placed in operation in April 1963,

and has carried more than 20 million tons of coal.

3. The belt is a United States Bureau of Mines approved neoprene flame resistant belt.

4. The belt is a transit aligned, roof suspended belt with the head and tail pieces set firmly in concrete to prevent movement and minimize friction at the head and tail pieces.

5. Belt supports are A-frames which are set on approximately 970-foot centers.

6. The belt is driven by electrical motors. The electrical equipment controlling these drives is enclosed in noncombustible structures.

7. An underground storage bin receives coal from a coal crusher. Feeders located at the bottom of the storage bin permit an even flow of coal to be carried on the belt from the bill to the tippie.

8. Oversized idlers at the head and tail pieces and take-up drives with the attendant oversized shafts and bearings reduce possible friction at the drives.

9. The belt flights are set in sequence and when one belt flight stops all inby belts automatically stop.

10. The belt has been aligned with no or minimum of canting to assure training thereby minimizing friction.

11. Heavy duty loading and troughing idlers are installed so that they rotate slower than regular sized idlers.

12. The belt has specially designed reactor starting circuitry

rather than a point contractor type starter. This minimizes slippage and will permit smooth starts thereby minimizing heat at the drive.

13. The belt system has the following devices which will automatically shut down or indicate impending trouble: slip switches; belt drift at the head and tail pierces (sic); belt pierce switch; a chute plug; a motor heat; a thermal magnetic overload switch in the motor; a belt slippage switch and a motor bearing temperature increase.

14. Signal lights monitoring these devices are displayed on a panel which is viewed by the TV cameras.

15. The transfer points on the main belt are monitored on a closed circuit TV system.

16. The TV system is viewed by a trained man in a control room who can stop the entire belt by use of a switch.

17. The belt will not be operated unless the TV system is in operation or in cases of an emergency where a TV camera is not functioning, a man with suitable communication to the control room operation will be located at such drive or transfer point in lieu of the TV camera until the TV camera is repaired.

18. After the belt drive system is stopped following a production shift each belt drive area will be (a) visually inspected for fire within four hours after shutdown or (b) the operation will be attending the television detection control panel system for a four-hour period following shutdown or (c) any

equivalent system approved by the Bureau.

19. The stopping of the belt creates a silence in the mine which serves as an "audible" warning system to men in the mine.

20. A communications system is installed and maintained so that suitable communication is maintained with miners.

21. Water is put on the belt primarily for dust control but it does also create a wet belt.

22. Firefighting equipment is located so that miners can transport it and attack a fire at an affected belt drive within fifteen (15) minutes after being notified of a fire.

23. The mine has a large source of water available from a large dam which is fed by a stream. City water is also fed into the mine. The main water lines are located in the haulage ways with water tapoff lines leading directly to the belt drives.

24. Firehoses capable of delivering a minimum of 50 gallons of water per minute at 50 psi to the belt drive equipment will be provided within sixty (60) days of date of order of the board or as further extended by the Bureau of Mines.

25. The fireplugs have constant water to the valves and are tested at regular intervals.

26. At least 500 feet of hose will be at each belt drive.

27. The ventilation system will be maintained so that persons fighting fires will be able to travel and operate in intake air during fire control activities.

28. There are four specially

May 30, 1973

equipped fire trains strategically located within the mine so that at least two and possibly four trains can approach a fire in intake air.

29. A locomotive is attached to each fire train. The locomotives are tested weekly.

30. The fire trains consist of the following: a car with approximately eight tons of rock-dust; a car with various brattice, fire extinguisher, tools, etc.; a water tank with a 1,200-gallon capacity and high pressure pump capable of delivering 50 gallons of water at 50 psi. A special foam generator equipment is available.

31. High pressure rock-dusting machines with attached hose are available in the working areas of the mine and can be transported to any fire location.

32. At least one portable ABC dry chemical fire extinguisher is located at every belt drive.

33. There is a more than the required of 240 lbs. of rock-dust located at each belt drive.

34. There are two completely equipped well-trained mine rescue teams of 16 people within the Jones & Laughlin Steel Corporation mine complex in this area, of which Gateway mine is a part, who train at least one day each month.

35. All Assistant Mine Foreman are trained in the use of fire suppression equipment.

36. There is a planned, well-publicized and posted procedure for methods of fighting fires and spe-

cific lines of authority to direct the fighting of a fire.

37. There are several fire companies located within five (5) miles of the mine and their equipment is available.

38. The mine is located in an area with seven or eight other mines and equipment and well-trained men from these mines are available to fight fires.

39. Ventilation doors are installed to control the air flow over the belt drives in case of a fire.

40. Power is sectionalized so that it can be cut off in any area of the mine and still permit fire trains to get to the fire location.

41. The men in the mine walk section escapeways once a month.

42. Gateway Mine was used as an example of an excellent fire fighting program by the United States Bureau of Mines in a recent publication #8631.

43. The United Mine Workers of America did not appear at the hearing to object to this Petition for Modification.

44. This Agreement applies only to the Gateway Mine of Gateway Coal Company. This Agreement shall continue in effect until such time as the management of Gateway Mine determines in its discretion that it shall no longer operate in whole or in part in accordance with the terms of this Stipulation and Modification Order and that it will, instead, operate in accordance

with section 311 of the Act and the impending regulations. In the event that the management of Gateway Mine makes this determination, a thirty-day prior written notice shall be given to the Bureau.

45. The Gateway Mine will at all times comply with these conditions as set forth in this Stipulation of Facts.

CONCLUSION OF LAW

The belt system at the Gateway Mine as set forth in the Stipulation of Facts is an acceptable alternate method of achieving the results of the Mandatory Safety Standards of section 311 of the Federal Coal Mine Health and Safety Act of 1969 which at all times guarantee[s] no less than the same measure of protection afforded the miners in the Gateway Mine as the standards of section 311 and the implementing regulations.

WHEREFORE, the parties respectfully request the Board of Mine Operations Appeals to approve the Petitioner's 301(c) Petition for Modification as set forth in this Stipulation.

Date: 12/13/72

Daniel R. Minnick
Gateway Coal Company

Date: 1/11/73

I. Avrum Fingeret
Attorney for United States
Bureau of Mines

ESTATE OF WILLIAM CECIL ROBEDEAUX

2 IBIA 33

Decided June 5, 1973

Appeal from Judge's decision denying petition for rehearing.

Affirmed.

140.2 Indian Probate: Attorneys at Law: Fees

Contracts between attorneys and Indian clients for fees are not controlling upon the Government when payment is to be made from the funds of a restricted or trust estate.

140.2 Indian Probate: Attorneys at Law: Fees

Attorney's fees in Indian probate will be determined on the basis of "reasonableness" a corollary of "quantum meruit" defined "as much as he deserved."

140.2 Indian Probate: Attorneys at Law: Fees

When an attorney seeks a fee allowance from a Judge other than the one before whom he appeared while performing legal services, it is incumbent upon him to make proof of the extent of the services and the skill employed; the record must be complete when the matter reaches the reviewing authority; and in such cases a claim for fees based solely upon the gross number of hours worked multiplied by an arbitrary rate per hour will be given little credence.

APPEARANCES: Houston Bus Hill
and Thurman S. Hurst, attorneys pro
se.

OPINION BY MR. McKEE
INTERIOR BOARD OF
INDIAN APPEALS

This matter is before this Board for the second time. This appeal is from the decision issued by Judge Curran, July 21, 1972, denying the petition of Houston Bus Hill and Thurman S. Hurst for rehearing. The Board's first decision, *Estate of William Cecil Robedeaux*, 1 IBIA 106, 78 I.D. 234 (1971) disposed of a number of issues, but remanded the single issue of the appellants' entitlement to and the amount of attorney's fees, if any, for further hearing and decision. The appellants' claim was for a total of \$8,250, and after the remand-hearing Judge Curran allowed \$1,500 to which appellants object.

The fact situation is largely set out in the Board's first decision. For the purposes of this decision the following summary is sufficient:

1) The decedent was married at his death; 2) he died December 16, 1968, leaving a will dated March 2, 1967, which has received a Departmental final approval; 3) in 1957, eleven years prior to decedent's death, a son, Willis Robedeaux was appointed by an Oklahoma court as guardian of his father's estate to receive and disburse the income derived almost exclusively from Indian trust property; 4) during the guardianship a divorce action was initiated in the decedent's own name, and his ability to prosecute the suit in spite of the apparent disability of the guardianship was

affirmed by the Supreme Court of Oklahoma in *State ex rel. Robedeaux v. Johnson*, — Okla. —, 418 P.2d 337 (September 13, 1966); 5) Mr. Hill was the sole attorney in the guardianship matter and Mr. Hurst was co-counsel in the divorce proceedings; 6) on April 15, 1966, the need for the guardianship ended upon the Indian Bureau's decision to reassert full control of the trust estate income; 7) according to the final accounting filed in the guardianship on April 19, 1966, Mr. Hill had received a total of \$700 as fees, the last installment having been paid on that date; 8) neither the final accounting nor the amended final accounting was ever approved by the county court since the objections and other pleadings filed by the wife are not disposed of; 9) Mr. Hill did perform additional services in the guardianship, and in this probate is claiming an additional fee of \$1,500 of which he has been awarded \$300 by Judge Curran; 10) the county court of Oklahoma County issued no orders authorizing the employment of Mr. Hill as attorney for the guardian or the institution of the divorce action; 11) no petition to fix fees was filed in either the county court or the district court; 12) no fees were advanced or paid during the course of the divorce action, and although the decision in *State v. Johnson, supra*, was issued September 13, 1966, the divorce had not been brought to trial on its merits prior to decedent's death on December 16, 1968; and 13) in this probate Mr. Hall and Mr.

Hurst are claiming fees for services in the divorce action in the amount of \$6,250 of which they have been awarded \$1,300 by Judge Curran.

In support of their claim for fees, the appellants attempt to rely upon a copy of a contract of employment of Mr. Hill only, the original of which appellants assert is lost, and which the son denies approving in any capacity. In paragraph 4 of the stipulation made part of the record of the hearing held on May 10, 1972, after remand, the strongest statement Mr. Hill could make was, " * * * that to the best of his knowledge and belief the decedent * * * signed and executed the [original of] attached 'contract and power of attorney' marked Exhibit 'C' * * *." No one has testified the decedent actually signed the original, and the copy bears the signature of Mr. Hill only.

That part of the contract upon which the appellants rely is the provision " * * * I hereby agree to pay you a fair and reasonable attorneys fee, based upon quantum merit (sic) * * *." In *Black's Law Dictionary* (Rev. 4th ed.) "quantum meruit" is defined, "as much as he deserved."

The establishment of a contract becomes moot under the rule laid down by the Solicitor in the *Estate of Tah-wat-is-tah-ker-na-ker or Lucy Sixteen*, IA 1324, 70 I.D. 531 (1963) wherein a contract for a contingent 25 percent fee was held not to be controlling. The Judge (formerly Examiner) acting under the regulations had made a determination of the reasonable compensation

to which the attorney (the same Mr. Hill as is here involved) was entitled and allowed \$1,000 of the \$9,456.33 claimed. The regulations then in effect, 25 CFR 15.26, and those currently in effect, 43 CFR 4.281, include substantially the same provisions,

* * * In determining attorney fees, consideration shall be given to the fact that the property of the decedent is restricted or held in trust and that it is the duty of the Department to protect the rights of all parties in interest.

This provision brings upon us the application of the doctrine of "quantum meruit" above quoted which is correlated with "reasonableness."

Judge Murrah wrote in the decision in *United States v. Anglin & Stevenson et al.*, 145 F. 2d 622, 630 (10th Cir. 1944) :

* * * it is well settled that in cases of this kind the allowance of attorneys' fees is within the judicial discretion of the trial judge, who has close and intimate knowledge of the efforts expended and the value of the services rendered. * * *

It is well stated by the court in *Kimball v. Public Utility Dist. No. 1 of Douglas County*, 391 P.2d 205, 64 Wash. 2d. 252 (1964) :

Canon of Professional Ethics 12, RCW Vol. O, * * * describes the determinants upon which reasonableness of the fee may be assessed. Such factors as the time and labor required, difficulty and complexity of the problems encountered, the amount, size and benefits to accrue from the controversy, the experience of the lawyers, and the customary charges of the bar for similar services—together with the other considerations mentioned—all are strong, though not con-

June 5, 1973

trolling, guides in ascertaining the true value of professional services.

A review of the record here reveals little as to the reasonableness of this claim. The claim is based upon Mr. Hill's allegation that he has not been compensated for 60 hours devoted to the guardianship, and that he and Mr. Hurst have not been compensated for 270 hours devoted to the divorce. The number of hours is the subject of some dispute. In paragraph 5 of Exhibit "1" (the stipulation entered into and filed at the hearing held after remand) Willis Robedeaux indicated he doubted the accuracy of the 270 hour figure since he felt Mr. Hill had charged for some "* * * time spent while working on other Indian cases."

There is nothing in the record which discloses an employment contract between Mr. Hurst and the decedent or the decedent's son either for that matter. None is actually alleged. Mr. Hurst stated at the rehearing held pursuant to the remand order:

* * * Now I didn't appear in the Oklahoma County Court or before this Federal Department. I just helped Mr. Hill as local counsel in the case. I did participate in the appeal in the Supreme Court and did help write the brief. (Tr. 7.)

The October 26, 1970, affidavit of Mr. Coleman Hayes, appearing as Exhibit "B" of the original claim, includes an expression of his opinion that the fees claimed were reasonable and indicates that "* * * \$25 per hour is less than the minimum which Mr. Hill would have

been warranted in charging." Mr. Hayes was never present before the Judge or subjected to cross-examination.

The appellants have made no attempt to explain or to establish the reasonableness of the \$25 hourly charge which they are claiming and which they have merely referred to as a minimum hourly fee. They presumably wished the Judge, and now the Board, to take judicial notice of a minimum fee schedule fixing an hourly charge for legal services. Notice is taken of the fact that bar associations have established so-called minimum fee schedules, but importantly, these are not limited to a schedule of hourly rates. Notice is taken that such schedules also present alternative lump-sum amounts for particular tasks such as the drafting of a will, the handling of a noncontested divorce, adoptions and guardianships, etc., but we have no means by determining what if any part of such a schedule in use in Oklahoma should apply here. These schedules have been and are properly used by the trial Judges as guides in setting fees in their own jurisdictions. But nothing in this record gives us the necessary criteria for application of any such schedule.

Further, there is little in this record to assist even Judge Curran, who was at the scene, in gaining knowledge of the quality of professional skill which was applied in either of the proceedings conducted entirely before the Judges of the Oklahoma State Courts. The claim

on file and the allegations in the notice of appeal are allegations only as to time spent. They are not evidence, and it could be argued that the work should properly have been completed in half the time. Judge Stephens in the decision in *Sampsell v. Monell*, 162 F.2d 4 (9th Cir. 1947) quoted the following with approval from the decision in *Woodbury v. Andrew Jergens Co.*, 37 F.2d 749, 750 (D.C. N.Y. 1930).

The value of a lawyer's services is not measured by time or labor merely. The practice of law is an art in which success depends as much as in any other art on the application of imagination—and sometimes inspiration—to the subject-matter. The exercise of these faculties may occur at any stage in a case, though their influence on the course of the proceeding may not be established till its outcome. In order, therefore, accurately to chancer the value of a lawyer's services, one must almost always examine them in the light of the event.

The state court judges before whom the appellants appeared in this litigation were in a much better position than Judge Curran to evaluate the services rendered, a value left much in doubt because no proceeding was pressed to its conclusion. The appellants would have been well advised to have made timely application for fees to the Courts where the matter were pending.

However, the court held in *State v. Johnson*, *supra*, that the guardianship being limited to the *estate* only did not prevent the decedent from prosecuting a divorce action in his own name. By inference that

holding permitted him to engage attorneys and obligate the estate for fees due in both the guardianship and the divorce. In *Johnson* we have,

Syllabus by the Court

* * * * *

2. A ward can maintain an action for divorce in his own name, where the guardianship was limited only to the ward's estate for the purpose of preserving the same, and there was no finding in the guardianship proceeding that the ward was insane.

Judge Curran acted upon the evidence before him within the regulations and within the rules of the cases cited above, within the rule in *Campbell v. Green*, 112 F.2d 143 (5th Cir. 1940) and within the rule in *In Re Seed Marketing Association, Inc.*, 228 F. Supp. 812 (D.C. Neb. 1964).

No abuse of discretion on the part of Judge Curran is asserted, and that issue is not before us. Judge Curran's ruling should be affirmed.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Judge's order denying the petition for rehearing is **AF-FIRMED**.

This decision is final for the Department.

DAVID J. MCKEE, *Chairman*.

I CONCUR:

MITCHELL J. SABAGH, *Member*.

June 12, 1973

**ARTHUR E. MEINHART, IRWIN
RUBENSTEIN**

11 IBLA 139

Decided June 12, 1973

Appeal from decision of Colorado State Office, Bureau of Land Management, dismissing protest and rejecting non-competitive acquired lands oil and gas lease offer C 11726.

Affirmed.

Oil and Gas Leases: Acquired Lands Leases—Oil and Gas Leases: Applications: Generally—Mineral Leasing Act for Acquired Lands: Generally

The regulatory requirement that an acquired lands oil and gas lease offer must be accompanied by a statement showing the extent of the offeror's ownership of the operating rights to the fractional mineral interest not owned by the United States in each tract covered by the offer to lease is satisfied by a statement to the effect that the offeror does not own an oil and gas lease on any part of the lands in question.

Merwin E. Liss, Cumberland & Allegheny Gas Company, 67 I.D. 385 (1960), is overruled.

APPEARANCES: Arthur E. Meinhart and Irwin Rubenstein, each pro se.

**OPINION BY
MR. HENRIQUES
INTERIOR BOARD OF
LAND APPEALS**

Acquired lands oil and gas lease offers C 11703 and C 11726 for identical lands¹ were filed simultane-

¹ The offers were filed for the 50% interest of the United States in SW $\frac{1}{4}$ sec. 24, N $\frac{1}{2}$ sec. 25, and NE $\frac{1}{4}$, S $\frac{1}{2}$ sec. 26, T. 10 S., R. 61 W., 6th P.M., Elbert County, Colorado.

ously in the Colorado State Office, Bureau of Land Management, at 10 a.m., October 12, 1970, by F. M. Ricks, and by Arthur E. Meinhart and Irwin Rubenstein, respectively. Each offer was for the 50 percent mineral interest owned by the United States in the described lands. In a drawing to establish priority of consideration, offer C 11703, filed by Ricks, received priority. Ricks' offer was accompanied by the statement: "Offeror herein does not own an oil and gas lease on any part of these lands."

Meinhart and Rubenstein protested issuance of a lease in response to the offer C 11703, contending that Ricks' statement was not in compliance with the pertinent regulation.²

By decision dated November 3, 1970, the Colorado State Office, concluded that the statement by offeror Ricks, while not identical with the language of the regulation, *supra*, is substantially in compliance therewith, and that it would be belaboring the issue to give the statement any construction other than that the offeror holds no interests in the mineral rights not owned by the United States in the acquired lands de-

² 43 CFR 3130.4-4 Fractional present interests.

"An offer for a fractional present interest noncompetitive lease must be executed on a form approved by the Director and it must be accompanied by a statement showing the extent of the offeror's ownership of the operating rights to the fractional mineral interest not owned by the United States in each tract covered by the offer to lease. Ordinarily, the issuance of a lease to one who, upon such issuance, would own less than 50 percent of the operating rights in any such tract, will not be regarded as in the public interest, and an offer leading to such results will be rejected."

scribed in the lease offer. This appeal followed.

The appellants contend that Ricks' offer is defective in that he had not filed a statement showing the extent of his ownership of the operating rights to the fractional mineral interest not owned by the United States, as required under the provision of the above-cited regulation.

Appellants argue that the holding in *Merwin E. Liss, Cumberland & Allegheny Gas Company*, 67 I.D. 385 (1960), [hereinafter referred to as "*Liss*"] and earlier cases therein cited, is governing in this case. *Liss* held that an acquired lands lease offer for land in which the United States owns only a fractional interest in the minerals is defective if it is not accompanied by a statement as to ownership of operating rights in the interest not owned by the United States, and the offer confers no priority upon an applicant until such time as the statement is filed. Appellants insist that offer C 11703 must be rejected for noncompliance with 43 CFR 3212.3(d), (recodified as 43 CFR 3130.4-4 (35 F.R. 9693, June 13, 1970)).

At the time the controversy in *Liss* arose the pertinent regulation required that an offeror had to show whether he owned the entire operating rights to the fractional mineral interest not owned by the United States in the tract covered by the offer to lease, and if not, the extent of offeror's ownership *and the names of other parties who own operating rights in such fractional*

interests. As *Liss* pointed out, this regulation asks only for information concerning operating rights and the response should be direct and specific. Failure by *Liss* to give such specific information compelled a holding in *Liss* that his offer was defective.

Here the offeror is required only to show whether *he* owns any operating rights in the nonfederal mineral interests in the lands. Under the amended regulation the offeror is not required to identify holders of outstanding interests. We agree with the determination by the State Office that the statement by Ricks, that the "Offeror * * * does not own an oil and gas lease on any part of these lands," is readily susceptible of the interpretation that he does not own any operating rights to the oil and gas therein.

In the field of oil and gas law, the terms "operating right," "operating interest," and "working interest" are synonymous. "Operating interest" has consistently been defined as "the mineral interest minus the royalty interest;" "an interest in oil and gas that is burdened with the cost of development and operation of the property." H. Williams and C. Meyers, *Oil and Gas Law*, Vol. 6 (1964). The operating interest is normally created by an oil and gas lease. See *United States v. Thomas*, 329 F.2d 119 (9th Cir. 1964). Since an operating interest or right in the field of oil and gas is normally created by an oil and gas lease, and, absent any evidence to the contrary, it is reasonable to con-

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clude that Ricks' statement, "Offeror herein does not own an oil and gas lease on any part of these lands," was intended to mean that he holds no interests in the oil and gas rights not owned by the United States, and accordingly satisfies the regulation set forth *supra*.

We think the following language setting forth the purpose of the regulation is noteworthy:

* * * Ordinarily, the issuance of a lease to one who, upon such issuance, would own less than 50 percent of the operating rights in any such tract, will not be regarded as in the public interest, and an offer leading to such results will be rejected. 43 CFR 3130.4-4.

This is explanatory of the concern of the Department and the reason for the regulation. Where the the issuance of the lease will invest the lessee with the federal interest of 50 percent or more, as is the situation here, it does not particularly matter, for the purposes of this regulation, whether he owns additional interests in the tract or not; his other qualifications will be determinative of his right to receive the lease. So, whether Ricks had indicated he owned *all*, *part* or *none* of the operating rights to the nonfederal minerals, the same result would have ensued as his answer would not affect his right to receive the lease. Indeed, it has long been the practice of the Bureau of Land Management to accept, on appeal, the statement relative to the offeror's holding of nonfederal operating rights where the statement had not accompanied the offer, and to remand the case for appropriate

action by the State Office. *Cf.*, e.g., *Gussie Rodsky*, BLM-A 079982 (Miss.) (May 16, 1966). Here, where the offeror made a statement that he had no lease of the nonfederal mineral interest, a reasonable inference can be drawn that he intended to mean that he had no operating rights to such minerals. We hold that under the facts herein his statement satisfied the regulation, and that therefore there was no violation of the regulation under the doctrine of *McKay v. Wahlenmaier*, 226 F.2d 35, 43 (D.C. Cir. 1955).

Considering the practice by the Bureau since the *Liss* decision and the absence of any practical use for the requested information as to operating rights on the nonfederal minerals, we believe this Department has no need now to follow *Liss* and that decision is overruled.

We find that the Colorado State Office correctly rejected lease offer C 11726 and dismissed the protest filed by Meinhardt and Rubenstein against issuance of acquired lands oil and gas lease C 11703.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

DOUGLAS E. HENRIQUES, *Member*.

WE CONCUR:

EDWARD W. STUEBING, *Member*.

ANNE POINDEXTER LEWIS, *Member*.

FREDERICK FISHMAN, *Member*.

NEWTON FRISHBERG, *Chairman*.

DISSENTING OPINION BY MR. RITVO

I would reverse the Colorado Land Office decision and return the case to it for adjudication of the Meinhart-Rubenstein offer.

The sole issue in the case is the interpretation of the regulation governing the mineral leasing of acquired lands. The pertinent provision reads:

An offer for a fractional present interest noncompetitive lease must be executed on a form approved by the Director and it must be accompanied by a statement showing the extent of the offeror's ownership of the operating rights to the fractional mineral interest not owned by the United States in each tract covered by the offer to lease. Ordinarily, the issuance of a lease to one who, upon such issuance, would own less than 50 percent of the operating rights in any such tract, will not be regarded as in the public interest, and an offer leading to such results will be rejected. 43 CFR 3130.4-4.

The case turns upon the narrow issue of whether the statement by an applicant that he does not own a "mineral lease" or land is the equivalent of a statement that he does not own any "operating rights" in that land. As the majority decision recognizes, the Department held that it is not. *Merwin E. Liss*, 67 I.D. 385 (1969). There the regulation, 43 CFR 1954 ed. rev., 200.7, required, in addition to the one the current regulation asks for, a statement of the names of other parties who own operating rights in the fractional interest not owned by the United States. One offeror stated that one such party owned a 25% interest in the oil and gas. Another offeror

stated that the same party owned "the fee title to ***25% of the minerals" and that "it has issued no lease for the oil and gas deposits. ***"

The Department held both statements deficient for the reason that the owners of a fractional interest in oil and gas deposits underlying a tract of land may dispose of the operating rights without divesting himself of his mineral interest or through some device other than a lease. It pointed out that the regulation required only a simple direct statement and that the response should be direct and specific. A response, it held, which leaves the Department to infer the answer it requested is not enough.

The majority opinion, while overruling *Liss*, does not point out wherein it is in error. It contents itself with an assertion that "normally" an operating interest is created by a mineral lease, and that absent any evidence to the contrary, it is reasonable to conclude that a statement that a person does not own a mineral lease is intended to mean that he does not own any interests in the oil and gas.

By relying on the "normal" situation the majority recognizes that there are situations in which one who does not own an oil and gas lease can own the operating rights. Thus, it acknowledges that Rick's statement is not necessarily responsive to the mandatory requirement of the regulation and that there are situations in which one who owns the operating rights may not own an oil and gas lease. If, for example,

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Ricks owned the oil and gas rights, his statement that he did not own a lease would be technically accurate, yet it could be completely misleading as to his interest in the operating rights. That the regulation is mandatory is unquestioned. *Liss, supra*, and cases cited at 388; see also *Arthur E. Meinhart*, 6 IBLA 39 (1972).¹

The aside in the majority opinion that Ricks' statement would be defective if there were evidence that he had an interest in the operating rights highlights its inadequacy. There is nothing in the regulation to require any junior offeror to produce evidence that a recent offeror has in fact some ownership interest in operating rights when the latter's statement on its face does not exclude the possibility that he may have.

Since the regulation is mandatory, Ricks' offer did not earn priority until the defect was cured. The appellants, having filed a proper offer before then, are entitled to have their offer considered first and have a lease issued to them, if all else is regular. *Arthur E. Meinhart, supra*.

The majority also stresses that since the United States owns 75 percent of the mineral interest in the land applied for, nothing of conse-

quence would flow from whatever interest or absence of interest Ricks had in the operating rights. This argument would be just as persuasive if Ricks had neglected to file any statement at all or if his statement had consisted of some even more irrelevant assertion than he actually made, for example that he owned no oil and gas rights in adjoining land. A mandatory requirement of a regulation ought not to be treated so cavalierly.

Finally, the reference to the past practice of the Bureau of Land Management is supported by citation of *Gussie Rodsky*, BLM-A 079982 (Miss.) (May 16, 1966). *Rodsky* and the cases it cited permitted the successful drawee at a drawing held to determine priority under the simultaneous filing procedure, who had not filed the required statement with his entry card-offer, to file one thereafter.

It is not clear whether the decision rests upon the conclusion that the simultaneous filing regulation did not plainly require that the statement be filed with the entry-card (see *John J. King*, A-30472, February 28, 1966), or that the failure to file the statement was of no importance because a lease could be issued to an offeror who had no interest in the operating rights so long as the United States owned a 50 percent or larger interest in the fractional mineral interest. Since we do not have an entry-card offer situation here, the first ground is inapplicable. The second, of course, is in complete disregard of a clear re-

¹ For other recent cases in which the Board has enforced a requirement made mandatory by similar language: see *Duncan Miller*, 10 IBLA 208 (1973); *Apollo Drilling and Exploration, Inc.*, 10 IBLA 81 (1973); *William Tate*, 10 IBLA 78 (1973); *James V. McGowen*, 9 IBLA 133 (1973); *Read and Stevens, Inc.*, 9 IBLA 67 (1973); *James Monteleone*, 9 IBLA 53 (1973); *The Polumbus Corporation*, 8 IBLA 84 (1972).

quirement of the regulation. I note that neither *Rodsky*, nor the cases it cites, refer to the *Liss* case. That decision then, does not help in the resolution of the problem presented by this appeal.²

In my opinion, we are left with an offeror who failed to comply with a mandatory requirement of a regulation. The majority gives him priority over a junior offeror who filed a proper offer. This, I submit, is in error.

MARTIN RITVO, *Member*.

WE CONCUR:

JOAN B. THOMPSON, *Member*.

JOSEPH W. GOSS, *Member*.

**EASTERN ASSOCIATED COAL
CORPORATION
(JOANNE MINE)**

2 IBMA 128

Decided *June 13, 1973*

Bureau of Mines appealing decision dated January 26, 1973, of Administrative Law Judge Moore vacating an Order of Withdrawal issued pursuant to section 104(a) of the Federal Coal Mine Health and Safety Act of 1969, and regulations promulgated thereunder (Docket No. MORG 73-118).

² *Rodsky* also cites, without discussion, 43 CFR 1821.2-2, a regulation permitting the late filing of documents in certain situations. It is enough to point out that it is very doubtful that the late filing of a statement that is required to be filed with an entry-card can be waived in an entry-card drawing and it is plain that it cannot be relied upon in a conflict between two over-the-counter filings.

Reversed.

**Federal Coal Mine Health and Safety
Act of 1969: Imminent Danger**

The statutory definition of "imminent danger" (section 3(j) of the Act) must be read in its entirety without picking out individual words or phrases and also must be construed in conjunction with section 104(a) of the Act providing for the issuance of imminent danger orders.

**Federal Coal Mine Health and Safety
Act of 1969: Imminent Danger**

An "imminent danger" exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the affected area of the coal mine before the dangerous condition is eliminated; thus, the dangerous condition cannot be divorced from the normal work activity.

**Federal Coal Mine Health and Safety
Act of 1969: Closure Orders: Imminent
Danger**

Where a Bureau of Mines inspector observed an "imminently dangerous" condition, immediately issued an order of withdrawal pursuant to section 104(a) of the Act, remained on the scene until in his judgment the danger was eliminated, and then lifted the order so that normal mining operations could be resumed, he acted in a reasonable, proper and lawful manner.

APPEARANCES: Robert W. Long, Associate Solicitor, J. Philip Smith, Assistant Solicitor, Madison McCulloch, Trial Attorney, in behalf of appellant, U.S. Bureau of Mines; Thomas E. Boettger, Esquire, in behalf of Eastern Associated Coal Corporation; Charles Widman, Esquire, in behalf of the United Mine Workers of America.

DECISION BY THE BOARD
INTERIOR BOARD OF MINE
OPERATIONS APPEALS

Procedural Background

On April 24, 1972, the Bureau of Mines (hereinafter Bureau) issued an Order of Withdrawal No. 1 CJT to Eastern Associated Coal Corporation (hereinafter Eastern) for an "imminent danger" at its Joanne Mine in Rachel, West Virginia, pursuant to the authority vested in the Secretary by section 104(a) of the Federal Coal Mine Health and Safety Act of 1969 (hereinafter the Act).¹

An Application for Review was timely filed by Eastern pursuant to section 105(a)(1) of the Act. The Bureau filed its answer to and denial of Eastern's allegations and moved for dismissal of the Application. The United Mine Workers of America (hereinafter UMWA), as representative of the miners, also timely filed through counsel its opposition to Eastern's Application. A hearing was held on September 21, 1972, and proposed findings of fact and conclusions of law were submitted to the Judge by the UMWA and Eastern. The Decision and Order of the Judge, vacating the subject Order of Withdrawal was issued January 26, 1973.

Notice of Appeal to the Judge's Order was filed with this Board by the Bureau, and Eastern timely filed its brief and request for oral argument. After time for filing briefs

had expired, the UMWA moved the Board to permit late filing of a brief in support of the Bureau's appeal, which was opposed by Eastern. The Board's Order Scheduling Oral Argument, issued April 11, 1973, allotted time to the Bureau, Eastern, and the UMWA. Oral argument was held before the Board *en banc* on April 26, 1973, at which all parties, including UMWA, participated. The Board held in abeyance its ruling on the motion of UMWA and Eastern's opposition thereto.

The Board has now considered the motion of UMWA for acceptance of its late-filed brief and the opposition of Eastern and concludes that the Eastern opposition is well taken and that UMWA forfeited its right to participate in this appeal by failure to file a timely notice of appeal or timely brief in support of the Bureau's appeal. Therefore, the Board has not considered either the UMWA brief or oral presentation in reaching its decision in this case.

Factual Background

The Bureau Inspector, C. J. Thomas, entered the Joanne Mine for a spot inspection early on the morning of April 24, 1972, and proceeded to an area of the mine described as the No. 4 Entry. He was accompanied by another Bureau inspector and by Eastern's safety supervisor. At the time of the inspection, there was no mining activity or movement of equipment taking place.

¹ P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

In this mine, shuttle cars are loaded by a continuous miner and coal is dumped directly into mine cars. In order to allow the boom of the shuttle car to be raised above the edge of the mine car so that the coal can be loaded, the roof in the loading-point area is "shot out" or otherwise raised and the area where the roof is thus raised is called the "boom hole." The brow of the boom hole is the edge farthest away from the mine car and closest to the face area.

When the Bureau inspector arrived at the loading point, he discovered an unmanned shuttle car parked in the entry on top of an accumulation of loose rock and coal, so that there was very little clearance between the top of the shuttle car and the roof in by the brow of the boom hole. The inspector also observed that there were two loose roof bolts extending downward about six inches from the ceiling above the shuttle car, apparently dislodged by contact with passing cars.

It appears that Eastern's section boss, Mr. Root, also had observed this condition and had ordered his crew to remove the shuttle car and clean up the area. Upon observing the condition himself, Inspector Thomas orally issued an order of withdrawal from the No. 4 Entry for the reason that he considered that in any movement of the shuttle car there was an imminent danger to a car operator because of the lack

of clearance and because of the two loose roof bolts which were hanging down and could cause serious physical harm to the car operator. Eastern's section crew in the area at the instruction of the section boss had set out to abate the dangerous condition by driving the shuttle car out of the area and removing the material which clogged the roadway. Inspector Thomas remained on the scene during the period of abatement until the danger was eliminated to his satisfaction.

Upon returning to the surface, the inspector issued his written order of withdrawal which described the condition or practice constituting the imminent danger as follows:

There is an excessive accumulation of loose coal and rock on the floor in No. 4 Entry, 8 feet in by 16 left section loading point extending for a distance of 25 feet. The vertical clearance is restricted to 54 inches. The shuttle cars have rubbed the roof and dislodged two roof-bolt which are hanging down 6 inches at the brow of the boom hole. This is a hazard to the shuttle car operators.

The Administrative Law Judge held that there could be no doubt that a danger existed in the No. 4 Entry of the mine at the time the order of withdrawal was issued, and that it was clear that it was a type of danger which could reasonably be expected to cause death or serious physical harm; however, it was his further view that the danger did not meet the definition of "imminent danger" as defined in section

3(j) of the Act and that, therefore, the order should be vacated.²

Issue Presented

Did the Bureau of Mines inspector act in conformance with the mandate of section 104(a) of the Act in issuing the order of withdrawal?

Discussion

Our review of the entire record in this case indicates that there is no substantial dispute concerning the conditions that existed near the loading point at the time of the inspection, nor is there any doubt that a danger existed of a type which could reasonably be expected to cause death or serious physical harm to an operator of the shuttle car. The sole disagreement centers on the question of the "imminence" of the danger in light of the operator's work stoppage and commencement of the abatement process prior to issuance of the order; i.e., whether the condition could reasonably be expected to cause death or serious harm *before it could be abated*.

The Bureau contends that the reasoning of the Judge in holding that the danger did not meet the statutory definition of "imminent danger" is faulty in that the Judge overlooked the Board's previous holdings in *UMWA, Dist. No. 31*

and *Valley Camp*³ that an order of withdrawal not only takes the miner or miners out of the area of the dangerous condition, but also keeps them out until the danger has been eliminated. The Bureau argues that to apply the rationale of the Judge would be to permit an operator to avoid any order of withdrawal simply by withdrawing the miners from the condition pointed out by an inspector, at least until the inspector departed the premises. Although the facts in the case at hand are distinguishable from those in the *aforecited* cases, and although we adhere to the principle enunciated in those cases, we need not rely upon those cases to support our decision here.

The statutory definition of "imminent danger" must be read in its entirety without picking out individual words or phrases, and also must be construed in conjunction with section 104(a) of the Act providing for the issuance of imminent danger orders. We also note that section 104(d) of the Act provides in part that persons whose presence in the area of danger is necessary, in the judgment of the operator or a Bureau inspector, to eliminate the dangerous condition shall not be required to be withdrawn. Thus, it would logically follow, and we believe the Congress clearly intended, that a 104(a) withdrawal

² Sec. 3(j) of the Act: "Imminent danger" means the existence of any condition or practice in a coal mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

³ *United Mine Workers of America, District #31*, 1 IBMA 31, 78 I.D. 153, 2 CCH Occupational Safety and Health Guide par. 15, 367a, at p. 20,510 (May 4, 1971). *The Valley Camp Coal Company*, 1 IBMA 243, 79 I.D. 730, 2 CCH Occupational Safety and Health Guide par. 15,390, at p. 20,568 (December 29, 1972).

order requires that normal mining operations in the area of danger must cease until the inspector determines that the imminent danger has been eliminated. It is our view that an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated. The dangerous condition cannot be divorced from the normal work activity. The question must be asked — could normal operations proceed prior to or during abatement without risk of death or serious physical injury? If the answer to this question is “no,” then an imminently dangerous situation exists and the issuance of a 104(a) withdrawal order is not only proper but mandatory under the Act. Although prior evacuation of miners or voluntary work stoppage by an operator may be laudatory and indicate concern for the safety of the miners, such actions, although taken in all good faith, cannot operate to eliminate an otherwise imminently dangerous condition or practice. Likewise, the fact that the process of abatement may have commenced prior to the issuance of the order, and that the time required for abatement may be brief, does not in our view serve to invalidate the order. We emphasize that the phrase in the definition “before such condition or practice can be abated,” in no way relates to the time it may take to abate but relates solely to the condition of “imminence” of dan-

ger. In other words, a condition or practice cannot be imminently dangerous if the specific and usual mining activity can safely continue in the area during (or prior to) the abatement process.

We have considered and we reject Eastern’s argument that the inspector exceeded his authority for the reasons that he could or probably should have taken alternative actions, such as issuing notices of violation or doing nothing, which in Eastern’s view, would have accomplished the same result. This argument could be raised in almost every case. However, we are not called upon here to decide whether the inspector chose the most appropriate of several alternatives, but rather we are called upon to decide whether the action he did take was a proper and lawful exercise of authority under the Act.

The Secretary under section 104(a) of the Act is mandated to be alert for conditions and practices constituting imminent danger, and to take immediate action calculated to insure the safety of the miner or miners exposed to such hazard until such time as the conditions or practices causing the danger are eliminated to his satisfaction and he has determined that normal mining operations may safely be resumed in the area.

The facts presented in this case indicate to us that the inspector acted in a reasonable, proper and lawful manner. He observed an imminently dangerous condition, immediately issued a 104(a) order, remained on the scene until, in his

judgment, the danger was eliminated, and then lifted the order so that normal operations could be resumed. We conclude therefore that the issuance of the withdrawal order was in conformance with section 104(a) of the Act, and that the decision of the Administrative Law Judge vacating the order must be reversed.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that:

The decision of the Administrative Law Judge IS REVERSED and the Order of Withdrawal No. 1 CJT, issued April 24, 1972, to Eastern Associated Coal Corporation IS AFFIRMED.

C. E. ROGERS, Jr., *Chairman.*
JAMES M. DAY, *Ex-Officio Member.*

DISSENTING OPINION BY MR. DOANE

With all due respect to my colleagues, I must dissent from the views expressed in the majority opinion. The sole question presented by this appeal is whether the inspector properly applied the statutory definition of "imminent danger"¹ in issuing the withdrawal order at the Joanne Mine, April 24, 1972. I agree with Judge Moore that he did not.

My review of the record convinces me that the inspector's action was based upon a misunderstanding of the meaning of "imminent danger," as well as a misconception of the proper role of an imminent danger withdrawal order under the Act.

As I understand the facts in this case, the safety hazards described could cause no physical harm or death to a shuttle-car operator or anyone else, *unless* shuttle cars were to be operated through the restricted passageway. However, the restrictions were in the process of being removed and the potential dangers abated *prior* to or *before* there could be any *reasonable* likelihood or expectation that anyone would attempt to run shuttle cars through the dangerous area. This being the situation, the element of "imminence" was absent at the time the inspector issued the withdrawal order.

Meaning of "Imminent" and "Imminent Danger"

The plain meaning of the word, "imminent," according to *Webster's New International Dictionary, Unabridged*, 2d Ed., is: "Threatening to occur immediately; near at hand.

* * * Imminent applies to that [danger] which threatens to happen immediately, or is on the point of happening."

The choice of language used by Congress in section 104(a) of the Act indicates an unmistakable intention that there must be now, at the present time, not sometime in the future or upon the happening

¹ Section 3(j) of the Act is set out in note 2 of the majority opinion at 134.

of another event, an existing danger which can *reasonably* be expected to cause serious injury or death *before* it can be abated. This is supported by the Legislative History of the Act, which includes the following statement:

The concept of an imminent danger as it has evolved in this industry is that the situation is so serious that the miners must be removed from the danger *forthwith* when the danger is discovered without waiting for any formal proceedings or notice. The seriousness of the situation demands such immediate action. The first concern is the danger to the miner. *Delay, even of a few minutes, may be critical or disastrous.* After the miners are free of danger, then the operator can expeditiously appeal the action of the inspector. (*Italics supplied.*)²

The majority overlooks the foregoing Legislative History as well as a basic rule of statutory construction in its statement, at 135, *supra*, that "The statutory definition of 'imminent danger' must be read in its entirety without picking out individual words or phrases * * *." It is true that the definition must be read in its entirety, but the key words, "reasonably" and "before" in section 3(j) of the Act cannot be ignored.³

² Committee on Education and Labor, House of Representatives, Legislative History Federal Coal Mine Health and Safety Act (March 1970) at 89.

³ "It is an elementary rule of [statutory] construction that effect must be given, if possible, to every word, clause and sentence of a statute." * * * Sutherland, *Statutory Construction*, 3d Ed., § 4705 at 339; See *U.S. v. Menasche*, 348 U.S. 528, 75 S.Ct. 513, 99 L. Ed. 615 (1955).

Is Time for Abatement of a Hazardous Condition to be Considered by an Inspector as a Factor in Determining Whether an Imminent Danger Exists?

The Board, in the majority opinion, at 137, *supra*, rejected Judge Moore's concepts regarding the part played by the element of time in the definition of "imminent danger," when it says:

* * * We emphasize that the phrase in the definition "before such condition or practice can be abated" in no way relates to the time it may take to abate but relates solely to the condition of "imminence" of danger. * * *

This position is not in harmony with the purposes of §§ 3(j) or 104(a) and (b) of the Act or with the Board's own decision in *Carbon Fuel Company*.⁴ The statutory words "imminent" and "before" connote the element of time; they are "time" words. In the *Carbon Fuel* case we correctly approved the concept that time for abatement must be considered in determining whether imminent danger exists in a coal mine.⁵ In that case, the Bureau of Mines argued and the Board favorably considered in holding for the Bureau, the following analysis:⁶ (1) to meet the *first criteria* of section 3(j) of the Act in determining

⁴ 2 IBMA 42, 2 CCH Occupational Safety and Health Guide par. 15,471, at p. 20,747 (1973). [hereinafter cited as *Carbon Fuel*.]

⁵ See "Findings of Fact," Nos. 4 and 13 in *Carbon Fuel*, at 46 and 48; also see paraphrased definition of section 3(j) at 49.

⁶ Bureau's brief at 15-16 in *Carbon Fuel*.

the existence of an imminent danger, an inspector must observe a condition in the coal mine which *must reasonably be expected to cause death or serious physical harm*, and (2) *then the inspector must properly consider the time that would be required to abate the condition.*

The Bureau argued in the *Carbon Fuel* case that in following the above steps, "The inspector was merely following the criteria of the Act in determining whether death or serious physical injury could reasonably be expected to occur *before the condition or danger could be abated.*"¹ The emphasis on the last eight words was supplied by counsel for the Bureau. No departure from this important and correct analysis of section 3(j) was even suggested in the Bureau's argument before the Board in the instant case.

Is the Board Called upon to Decide Whether the Inspector Chose the Correct Alternative Course of Action?

I believe that the Board *is* called upon to determine whether the inspector did choose the correct of several alternatives available to him under the Act. In considering all the sanctions available to the inspector, it must be remembered that every mandatory safety standard contemplates a potential danger or hazard to miners which the Act requires to be eliminated. Every such danger or hazard is not imminent,

however, and does not require the withdrawal of personnel. That is why section 104(b) of the Act requires the use of notices of violation of mandatory safety standards which prescribe a reasonable time in which the operator is to abate the safety hazard involved. The mere fact that an inspector has the discretion to issue a notice of violation, or, in the alternative where the circumstances are appropriate, an imminent danger withdrawal order, does not mean that the Board, as the final adjudicatory authority for the Department, must approve the subjective judgment of the inspector where he chooses the wrong sanction.

A principal function of any governmental administrative review tribunal, insofar as possible, is to counteract the actions of administrative personnel which do not conform to a statutory standard or which are not supported by the facts. Failure to do so would condone, in the first instance, an illegal, or, in the second, an arbitrary result.

When the inspector observed the hazardous conditions in this case, he was confronted with choosing one of three alternatives: (1) to issue a withdrawal order for imminent danger; (2) to issue appropriate notices of violation of mandatory safety standards which could require abatement within a matter of minutes; or (3) to issue no formal citation, since abatement was in process.

The record discloses that this inspector made two mistakes. First,

¹ *Id.*

he admitted that he did not recognize the violation of any mandatory safety standard. (Tr. 43, 45.) However, counsel for all the parties involved in this case agreed that there were at least three or possibly four mandatory safety standards that had been violated. Second, he issued a withdrawal order based on an obvious misunderstanding of the statutory meaning of the term "imminent." When asked by counsel for Eastern, "Do you know what the word 'imminent' means?", the inspector testified that it meant "a danger that could happen" and that a "hazard" and "imminent danger" meant the same thing. (Tr. 54.)

Because of this misunderstanding, the inspector exceeded the scope of his discretion intended by Congress to be limited by section 3(j) of the Act. The specific, limiting words and phrases, "which could reasonably be expected," and "before such condition or practice can be abated," were not applied by the inspector.

It was not *reasonable* for the inspector to believe that death or serious physical harm would come to a shuttle-car operator, who was neither operating nor about to operate a shuttle car through the restricted passageway. The most obvious reason for this conclusion is that the parked shuttle car and the debris had to be removed before the No. 4 Entry could physically accommodate the operation of shuttle cars. The record clearly supports the inference that the operator would continue and complete his abatement procedure before at-

tempting to operate shuttle cars. (Tr. 36.)

Conclusion

I believe the statutory definition of imminent danger is sufficiently clear to be applicable in the enforcement of the Act and that the majority's new definition, employing an undefined term, "normal mining operations," is too vague. "Normal mining operations" could *include* the activity of abating safety hazards in addition to the activity of digging coal.

I am fearful that if the majority's definition of "imminent danger" stands, much confusion within the industry as well as among coal-mine inspectors will result, and excessive issuance of "imminent danger" withdrawal orders will occur in lieu of section 104(b) notices of violation.

I would affirm the decision by the Administrative Law Judge vacating the section 104(a) order of withdrawal, issued by the inspector at the Joanne Mine.

DAVID DOANE, *Member.*

UNITED STATES v. LEE CHARTRAND ET AL.

11 IBLA 194

Decided *June 25, 1973*

Appeals from decision (Arizona A-1186) of Administrative Law Judge L. K. Luoma declaring certain mining claims to be null and void and declaring portions of other claims to be valid.

Affirmed.**Administrative Procedure: Administrative Law Judges—Rules of Practice: Appeals: Generally**

Upon appeal from a decision of an Administrative Law Judge, the Board of Land Appeals may make all findings of fact and conclusions of law based upon the record just as though it were making the decision in the first instance.

Administrative Procedure: Generally—Rules of Practice: Evidence

The Board of Land Appeals has authority to reverse the findings of an Administrative Law Judge. However, where the resolution of a case depends primarily upon the Judge's findings of credibility, which in turn are based upon his reaction to the demeanor of witnesses, his findings will not be lightly set aside.

Mining Claims: Common Varieties of Minerals: Generally

Where placer mining claims are located after July 23, 1955, for deposits of building stone, the stone may be an uncommon variety subject to location where it commands a higher price in the market place because of its unique patterns and coloration characteristics.

Mining Claims: Common Varieties of Minerals: Generally—Act of August 4, 1892

The Act of July 23, 1955, as amended, 30 U.S.C. § 611 (1970), had the effect of excluding from the coverage of the mining laws "common varieties" of building stone, but left the Act of August 4, 1892, 30 U.S.C. § 161 (1970), authorizing the location of building stone placer mining claims, effective as to building stone that has "some property giving it distinct and special value."

To determine whether a deposit of building stone is of a common or uncommon variety, there must be a comparison of the deposit with other deposits of similar type materials in order to ascertain whether the deposit has a property giving it a distinct and special value. If the deposit is to be used for the same purposes as minerals of common occurrence, then there must be a showing that some property of the deposit gives it a special value for such use and generally this value is reflected by the fact that the material commands a higher price in the market place.

Mining Claims: Discovery: Generally

Where locatable minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a mine, a discovery exists within the meaning of the mining laws.

Mining Claims: Discovery: Marketability

In applying the prudent-man test a critical factor to be considered, especially in the case of widespread nonmetallic mineral, is whether the claimed material is marketable. To establish the marketability of a widespread nonmetallic mineral a contestee must show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit.

APPEARANCES: Lee Chartrand, pro se, for appellants-contestees; Richard L. Fowler, Esq., Office of the General Counsel, United States Department of Agriculture, Albuquerque, New Mexico, for appellant-contestant.

*OPINION BY MR. FISHMAN
INTERIOR BOARD OF LAND
APPEALS*

On August 25, 1967, the Manager of the Arizona Land Office, Bureau of Land Management, initiated a contest on behalf of the United States Forest Service challenging the validity of the Picture Rock Claims Nos. 1, 2, 3, 4, 5, 6, and 7. These placer mining claims were owned by Lee Chartrand and Barbara Chartrand. The complaint was thereafter amended to include five additional placer mining claims, the Arizona Picture Rock Nos. 1, 2, 3, 4 and 5, which were located on September 1, 1967, by the contestees, Lee Chartrand, Barbara Chartrand, Robert Chartrand, Lloyd Chartrand, Donald Chartrand, Debra Chartrand, Denise Chartrand, and Robert B. Jones.

The Administrative Law Judge¹ found that the mining claims challenged in the original complaint (the Picture Rock Claims Nos. 1-7) were abandoned, and declared them to be null and void. No party has challenged the determination made by the Judge in connection with these claims on appeal to this Board.

In connection with the remaining claims (the Arizona Picture Rock Nos. 1-5) the amended complaint charged that a valid mineral discovery did not exist within the limits of the claims, that the land

embraced within the limits of the claims was nonmineral in character, that the mineral material found within the limits of the claims was not a valuable mineral deposit within the meaning of 30 U.S.C. § 611 (1970), that the land included within the limits of the claims was not chiefly valuable for minerals, that the claims were not located in good faith, and that the claims were not located by bona fide locators acting in association and were therefore in excess of the acreage allowed by the mining laws of the United States.

Based upon all the evidence presented at the hearing the Judge found that the deposits of stone in the Arizona Picture Rock Nos. 1, 3, and 4 were of a common variety. Thus, he concluded that these three claims were not subject to location after July 23, 1955, and declared the claims null and void. In connection with the Arizona Picture Rock Nos. 2 and 5 the Judge found that a deposit of stone exposed in a quarry situated on portions of both of these claims possessed a unique colorization characteristic which occurred in very limited areas of the widespread Coconino sandstone deposits found in the area. The Judge found that the stone from this quarry commanded a higher price in the marketplace than other stone used for the same purposes. Thus, he concluded that the deposit of stone possessed a property giving it a distinct and special value and that the deposit therefore was not a common variety of stone removed from the

¹ The change of title of the hearing officer from "Hearing Examiner" to "Administrative Law Judge" was effectuated pursuant to order of the Civil Service Commission, 37 F.R. 16787 (August 19, 1972).

June 25, 1973

ambit of the mining laws by the Act of July 23, 1955, 30 U.S.C. § 611 (1970). The Judge also found that the mineral character of the deposit of stone from the quarry was only demonstrated to exist in sufficient quantities on two ten-acre subdivisions of the Arizona Picture Rock No. 2 and on two adjacent ten-acre subdivisions of the Arizona Picture Rock No. 5. Consequently, the Judge concluded that discoveries of valuable minerals were only shown to exist on these portions of the claims and that the remaining portions of the claims were non-mineral in character and, therefore, null and void.

In connection with the marketability of the stone in question, the Judge found that a market existed in Phoenix, Arizona, and in other places where the stone from the quarry could be sold at a profit. Thus, he found that a person of ordinary prudence would be justified in spending his time and money in developing the property as a mine.

The contestant has appealed from that part of the Judge's decision which declared portions of the mining claims to be valid. The contestees have appealed from that part of the Judge's decision which declared the mining claims in issue to be null and void.

In order to determine whether a mining claimant has discovered a valuable mineral deposit within the meaning of 30 U.S.C. § 22 (1970), the Department has tradi-

tionally employed, with judicial approval, the prudent-man test. Under this test, a discovery exists " * * * where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine * * *." *Castle v. Womble*, 19 L.D. 455, 457 (1894); see *United States v. Coleman*, 390 U.S. 599 (1968). In applying the prudent-man test a critical factor to be considered, especially in the case of a widespread nonmetallic mineral, is whether the claimed material is "marketable." To establish the marketability of a widespread nonmetallic mineral, a contestee must show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit. *Foster v. Seaton*, 271 F.2d 836, 838 (D.C. Cir. 1959); *Layman v. Ellis*, 52 L.D. 714 (1929).

The mining claims in issue were located as placer claims for building stones. The Act of August 4, 1892, 27 Stat. 348, 30 U.S.C. § 161 (1970), is therefore applicable. The Act provides in pertinent part:

Any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims. * * *

The mining claims in issue were located subsequent to the enactment of the Act of July 23, 1955, 30 U.S.C. § 611 (1970). The Act provides in pertinent part:

No deposit of common varieties of * * * stone * * * shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: *Provided, however* * * * "Common varieties" * * * does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value * * *.

In *United States v. Coleman*, *supra* at 605, the Supreme Court considered the effect that 30 U.S.C. § 611 (1970) had on 30 U.S.C. § 161 (1970). The Court stated:

Thus we read 30 U.S.C. § 611, passed in 1955, as removing from the coverage of the mining laws "common varieties" of building stone, but leaving 30 U.S.C. § 161, the 1892 Act, entirely effective as to building stone that has "some property giving it distinct and special value" (expressly excluded under § 611).

As stated in *United States v. Minerals Development Corporation*, 75 I.D. 127, 134 (1968), the Department interprets the 1955 [A]ct as requiring an uncommon variety of stone to meet two criteria: (1) that the deposit have a unique property, and (2) that the unique property give the deposit a distinct and special value. In order to determine whether a deposit of stone has a unique property which gives it a distinct and special value, there must be a comparison of the material under consideration with

other deposits of similar materials. Therefore, it must be shown that the material under consideration has some property which gives it value for purposes for which other materials are not suited, or, if the material is to be used for the same purposes as other materials of common occurrence, that it possess some property which gives it a special value for such uses, which value is generally reflected by the fact that it commands a higher price in the market place. *United States of America v. California Soyland Products*, 5 IBLA 179 (1972). See *United States v. Thomas*, 1 IBLA 209, 78 I.D. 5 (1971).

In applying these tests to the evidence presented at the hearing, the Judge concluded that the contestees established a valid discovery on the 40-acre tract referred to above.

The Judge made several evidentiary findings to support his ultimate findings of fact and conclusions of law set forth above. The Judge's treatment of the evidence appears on pages 10 to 17 of his decision which we hereby adopt as set forth below:

Mr. Robert B. Wilson, a duly qualified engineer of mines and geology, employed by the United States Forest Service, testified in behalf of the Contestant (Ex. 1). The bulk of Mr. Wilson's testimony is contained in a mineral report dated November 13, 1968, and received in evidence as Exhibit No. 2. He examined the claims in May and September of 1967, and in September of 1968. They are situated approximately 17 miles west of Heber, Arizona, and 2½ to 4 miles north of State Highway 160. None of the permanent roads in the area furnish [sic] direct

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access to the claims but there are several abandoned logging roads by which they can be reached in a pickup truck. The topography of the claims is gentle to moderate and the area is covered with a heavy stand of ponderosa pine.

The Coconino sandstone formation crops out in many places on the claims and is believed to be the only bedrock formation in those areas of the claims where the bedrocks are obscured by overburden. However, the outcropping strata of Coconino sandstone are from the uppermost part of the formation and it is possible that there are some thin erosional remnants of the Kaibab limestone formation overlying the Coconino sandstone on some of the higher ridges where the bedrocks are obscured by a thin mantle of overburden.

The Coconino sandstone formation is a uniformly, medium-grained, well-cemented, white, pink and brown to red colored, cross-bedded sandstone of Permian age. The coloring usually follows the bedding or strata rather than crossing through it at angles, producing solid colors rather than varicolors in particular stones. It ranges from less than 100 feet to more than 500 feet in thickness and underlies the whole of the Coconino plateau where it crops out over wide areas in Mojave, Coconino, Yavapai, Navajo and Gila Counties, from as far east as Holbrook to as far west as Seligman, Arizona, a distance of 150 miles. It has been quarried in a great number of places.

Most, if not all, of the presently operating Coconino sandstone quarries are located in the vicinity of Ashfork, Arizona, where a wide range of colors can be obtained and the cost of quarrying and transportation is as low as any in the industry.

Mr. Wilson stated that the objective in a Coconino sandstone quarry is to get out as much flagstone as possible. He described a commercial grade of flagstone as being a minimum of two feet square in size, with a thickness varying from

under one inch to around two inches. The value drops fast on any stone over two inches thick.

He stated that thicker slabs may be cut into strips, called ashlar strips, which are marketable for veneering. In any quarry there remains a certain amount of waste rock of all shapes and sizes, not conforming to any particular specification, called rubble, which can be used for laying up into walls or making fireplaces. This material is so plentiful in all quarries that it can usually be obtained for the price of hauling it away.

He stated that all the quarries produce as many colors as possible and all colors sell for essentially the same price. A dealer price list (Ex. 9) shows the current prices paid producers for the various types of Coconino sandstone.

In general, the sandstone exposed on the claims is a rather thick-bedded, medium to fine-grained, light brown to dark red rock that has little tendency to split along the bedding. However, there are a few zones of cross-bedded rock in which the individual beds range from less than one inch to around fifteen inches in thickness. These cross-bedded strata contain sharp bands of contrasting colors that have a strong tendency to cut across the bedding. The most pronounced coloring is found in working No. 3 on the Arizona Picture Rock No. 2 claim. It is this type of coloring, in Mr. Wilson's opinion, that has led Contestees to believe the rock is an unusual variety.

In the way of improvements and development work on the claims, Mr. Wilson found a small one-room cabin, approximately $2\frac{1}{4}$ miles of abandoned logging roads that are being used as a means of access, six shallow bulldozer cuts, and one quarry. He plotted the development workings on Attachment No. 3 to Exhibit No. 2, and described them as follows:

No. 1 claim [footnote omitted]—Working No. 1 is a bulldozer cut approximately 40 feet long, 10 feet wide and $2\frac{1}{2}$ feet deep in which the overburden has been stripped from the top of the fine to medium grained, light to medium brown col-

ored sandstone. The sandstone is highly fractured and breaks out into small angular blocks that have little tendency to split along the bedding. None of the material excavated from the cut has been removed from the site.

No. 2 claim—Working No. 1 is a bulldozer cut approximately 65 feet long, 12 feet wide and $2\frac{1}{2}$ feet deep in which the overburden has been stripped from the top of a thickly bedded, light red colored sandstone. The sandstone is highly fractured and has little tendency to split along the bedding. None of the material excavated from the cut has been removed from the site. Working No. 2 is a bulldozer cut approximately 30 feet long, 14 feet wide and 3 feet deep, in which the overburden has been stripped from the top of the light brown colored sandstone. The sandstone is highly fractured and breaks out in small angular blocks that have little tendency to split along the bedding. None of the material excavated from the cut has been removed from the site. Working No. 3 covers an area approximately 250 feet long and 75 feet wide where the overburden has been stripped from a zone of cross-bedded sandstone in which there are sharp bands of color ranging from light yellowish-brown to dark red. The rock is more thinly bedded than that exposed in any of the other workings of the claims. Some of it will split into one-half to twelve-inch thick slabs. From the appearance of the working as of September 24, 1968, no more than 125 cubic yards of stone have been removed from rock in place. A considerable amount of the stone removed has been sorted according to thickness and stockpiled on the claim for use as flagstone and cut ashlar strips. Some flagstone and the ashlar strips cut from the thick slabs have been removed from the claim, but the amount removed and the price received could not be determined, as Lee Chartrand, who claims to be the only person to have removed stone from the claims would only state that he had sold the stone he had removed at a good profit, and could have sold a lot more if the

Forest Service had not taken action to prevent him.

No. 3 claim—Working No. 1 is a bulldozer cut approximately 45 feet long and 30 feet wide, in which the loose rock has been removed from the top of an outcropping of fine to medium grained, light brown colored sandstone. The sandstone is highly fractured and has little tendency to split along the bedding. None of the material excavated from the cut has been removed from the site. Working No. 2 is a bulldozer cut approximately 60 feet long, 14 feet wide and 3 feet deep, in which the overburden has been chipped from the top of a medium to fine grained, light brown colored sandstone. The sandstone is highly fractured and has little tendency to split along the bedding. None of the material excavated from the cut has been removed from the site.

No. 4 claim—Working No. 1 is a bulldozer cut approximately 40 feet long, 12 feet wide and $2\frac{1}{2}$ feet deep, in which the overburden has been stripped down to expose a small area of light brown colored, fine to medium grained sandstone. The exposed sandstone is highly fractured and appears to be thickly bedded. None of the material excavated from the cut has been removed from the site.

No. 5 claim—The west end of working No. 3 on the No. 2 claim, is believed to extend onto the No. 5 claim. There is no other working on the claim, but there are numerous outcroppings of the Coconino sandstone in which the rock is highly fractured and thickly bedded and little tendency to split along the bedding.

According to Mr. Wilson, the stone found in the quarry on claim No. 2 and extending somewhat into No. 5 (identified as working No. 3) has an unusual characteristic in that the coloring has a tendency to cross the bedding at angles rather than following the bedding or strata. When this stone is cleaved along the strata, it presents a varicolored pattern on its surface, ranging in all colors from white to red to almost purple. In a normal Coconino deposit, a given stone

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would cleave into a solid color only. This would be true of the stone he found in the other workings on the claims.

Mr. Wilson knows of no other Coconino sandstone that has a comparable coloration characteristic, and has never seen a quarry that has this feature in the rock where the coloring crosses the bedding so pronouncedly.

This type of coloration, in Mr. Wilson's opinion, resulted from weathering near the top of the Coconino formation. The ground water solutions have brought manganese and iron and, in percolating through the pores of the rock, precipitated the minerals causing the coloration. He felt that as the quarrying proceeds downward in the pit this type of coloration will disappear and the fresher rock at depth will have the normal solid coloration.

Mr. Wilson could not determine either from exposures, outcroppings or geological inference, as to how far this unusual deposit extended laterally from the quarry into the No. 2 and No. 5 claims. He stated it definitely did not cover the entire area of those claims and it did not occur at all on anything exposed on the Nos. 1, 3 and 4 claims.

Mr. Wilson expressed the opinion that the material on the claims would be classified as a common variety of sandstone of widespread occurrence and not locatable under section 3 of the Act of July 23, 1955. He also expressed the opinion that a market does not exist for the mineral material on the claims and that it cannot be marketed at a profit. He felt the claims are not chiefly valuable for mineral.

Mr. Leonard A. Lindquist, timber staff officer, Sitgreaves National Forest, with a degree in Forest Management from Iowa State University, testified that he made a timber appraisal of the area covered by the claims. He estimated that the total area is presently covered with 4,500,000 board feet of merchantable timber valued at \$35 per thousand, or \$160,000, and, in addition, 6,000 cords of pulpwood valued at \$1.00 per cord, or \$6,000.

These are stumpage values. He stated that the area is a very good quality site and constitutes an excellent place for growing timber.

Mr. Lee Chartrand, a timber cutter by occupation, began his testimony by displaying a large assortment of stone taken from the quarry previously described, and identified as working No. 3. (Mr. Wilson agreed that all the stone came from that working.) Part of the display was photographed in color and is shown in Exhibits G, H, I and J. Mr. Chartrand gave a demonstration of how the various stones on display could be cleaved by use of a hammer and chisels. An example was a slab of stone 3 feet by 18 inches by 1½ inches thick, which he split into two ¾-inch thick slabs. The cleaved surfaces exhibited beautiful color patterns, perfectly complementing each other, as shown in the color photos. He stated that artists consider these complementary designs to be in the nature of hand painted pictures which can be hung on the wall. One such split stone, shown in Exhibit C, he sold to a stone yard in Montana for \$15. Another one, shown in Exhibit D, he sold for \$30.

Mr. Chartrand described other stones, all of which he characterized as rubble, as being suitable for cleaving into thin tile for flooring and drainboards, generally competitive with ceramic tile. Others he described as suitable for making fireplace facings, lamp stands, and other ornamental objects. An example of a fireplace constructed with this stone is shown in Exhibit F, in which 1½ tons of rubble stone and 21 sq. ft. of hearth stone were used. An invoice in Exhibit K shows that Mr. Chartrand received \$84 for this stone.

Mr. Chartrand stated he could alone quarry, split and prepare for market, three tons of stone in a normal eight-hour day. He estimated that as soon as the quarry is opened up to the point where he is working on fresh surfaces he can process ten tons per day, using simple hand tools. He also stated that he had quarried down to a depth of six feet and the farther down he went, the colors of

the stone became brighter and the designs more beautiful.

Prior to initiation of this contest action, Mr. Chartrand had been advanced \$5,000 by a Mr. Hal Butler who was interested in marketing the stone from the quarry. By the middle of September 1967, Mr. Chartrand had about 100 tons of stone quarried and guillotined and placed on pallets, ready for delivery. He had built a hundred yards of new road which would have provided access to Mr. Butler's large diesel trucks. It was at this time, according to Mr. Chartrand, that the Forest Service blocked his access roads by bulldozing 3-foot-high mounds over them. This physical blocking of the roads prevented him from meeting his commitment with Mr. Butler, and resulted in cessation of his operations. Apparently the only actual sales he has succeeded in making so far are those shown by ten invoices, Exhibit K, totaling \$286.72.

Mr. Hal Butler, Show Low, Arizona, a salesman of lumber products, testified that he visited Mr. Chartrand's quarry on several occasions and took samples of the stone to display to his customers in the lumber industry. On the basis of their interest, he advanced Mr. Chartrand \$5,000 as capital to begin production. He stated that he immediately had two buyers, one an architect, for 100 tons at approximately \$55 to \$60 per ton f.o.b. the quarry. Mr. Chartrand was unable to fulfill his commitment, apparently because of being stopped by the Forest Service.

Mr. Gage Keith Fink, Phoenix, Arizona, testified as follows:

He first started prospecting for stone in 1945 and has since been in the business of quarrying different building stones throughout the southwestern states, establishing distributorships in the east and west, and retailing and wholesaling stone, with a yard in Phoenix and outlets in other cities. In recent years he has assisted groups on Indian reservations in Arizona in exploring for stone and investigating the possibilities of opening quarries for them.

He has purchased flagstone from Kai-

hab, Dunbar and from six or seven different quarries in the Drake, Williams, Seligman and Snowflake areas. Throughout the year he sells approximately 300 tons of Coconino flagstone. He estimated that 95 percent of all of the stone in all of the various quarries of flagstone consisted of a solid type color, either brown-beige, beige, or red. A very minor amount would be in the multi-colors. Nowhere else has he seen anything to compare with the multicolors found on Mr. Chartrand's claims.

He quarries many different types and colors of stone for mosaic-type veneering, including schist, quartz, jasper, onyx, sandstone and epidote. This has been used in the construction of a number of buildings in Phoenix, such as the Thomas Mall, County Complex, Christown, Valley National Bank and Western Electric. Using 25-ton trucks it costs \$6 per ton to haul stone into the Phoenix area from points farther away than Mr. Chartrand's claims. This stone sells in the retail yards for prices ranging from \$35 per ton up to \$200 per ton for some types. All of the stone exhibited by Mr. Chartrand could, without exception, be used in mosaic-type veneering. It can also be used as flagstone for patios, entranceways and flooring. Because of the swirling-type coloring, the stone is particularly attractive for use for entrances in homes, and for tile and other decorative uses. There is no other Coconino sandstone in the Arizona deposits which has this coloration characteristic.

For veneering purposes he sells stone for \$50 per ton which is not nearly as attractive as that on display in the hearing room. For decorative uses he sells ordinary solid colored flagstone for two cents per pound whereas the stone on display would sell for five to six cents per pound.

He acquired one load of stone from Mr. Chartrand. He sold one of the stones, similar to ones on display, for \$75 and he received a premium price for all the rest.

Mr. John J. Blakeley, Phoenix, Arizona, testified that he has been in the

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building materials and supply business in Phoenix for the past 39 years and is always looking for new products to offer contractors and to the general public. In addition to Phoenix, he has connections in the stone business in the Los Angeles area, the Bay area and the Pacific Northwest.

He visited Mr. Chartrand's quarry in the late summer of 1967 and acquired some of the stone as samples and immediately sold them to contractors. One of his outside contacts wanted an exclusive setup to handle the stone in the Bay area, where, at that time, the normal Coconino flagstone was bringing retail around \$80 per ton, or four cents per pound. This contact reported that if he could be supplied with this material from the claims he could sell it at a premium of two to three cents a pound over the normal. Mr. Blakeley again visited the claims and found that there was just no end to the beautiful stone up there and no end to its potential. He used the words "it's fantastic." He has supplied materials on a good many of the major buildings in Phoenix and all over Arizona, and has never seen anything to equal the beauty and uniqueness of this particular stone. He has all of the facilities necessary to merchandise this stone in Phoenix, and all he needs is a source of supply.

He presently has customers for the stone and merely needs deliveries from the source. The potential for the stone is almost unlimited in the construction business because it can be used for portico entries, foyers, veneering, swimming pools, patios, stepping stones, etc.

While not being a geologist, he testified that in his opinion the coloration formations exist because of centuries of sedimentation, chemical reaction, and compression, and that the coloration followed through consistently. It is not a seam coloration from oxides coming down through the seams. It is a coloration that seems to have been formed through a churning or whipping at the time it was in a mud or fluid state. The coloration goes solid all the way through the stone.

Contestant has appealed from that part of the Judge's decision which found portions of the mining claims to be mineral in character and contain a valid discovery. The gist of contestant's appeal is that the Judge failed to consider and give sufficient weight to all the relevant evidence in determining the facts which appear in his decision. In support of its position, contestant has incorporated in its brief on appeal several excerpts of testimony which are generally supportive of contestant's position on the issues raised in the hearing.

We cannot agree with contestant's argument that the Judge did not consider or give sufficient weight to certain evidence. The Judge's ultimate findings of fact were based upon all the evidence presented to him at the hearing, as he so stated in his decision. While the Judge did not mention certain facts, this did not establish that he failed to consider all the relevant evidence. *See United States v. Zerwekh*, 9 IBLA 172, 175 (1973).

This Department has a long-standing practice of affording considerable weight to the findings of the trier of fact at an administrative hearing. The reason for this practice is because the trier of fact who presides over a hearing has an opportunity to observe the witnesses, and is in the best position to judge the weight to be accorded conflicting testimony. *See Forrest B. Mulkins*, A-21087 (December 8, 1937), I.G.D. 22; *United States v. Humboldt Placer Mining Company*,

8 IBLA 407 (1972). We recognize that the Board of Land Appeals has authority to reverse the fact findings of a Judge; however, where, as here, the resolution of a case depends primarily upon his findings of credibility, which in turn are based upon his reaction to the demeanor of witnesses, his findings will not be lightly set aside by this Board. *State Director for Utah v. Dunham*, 3 IBLA 155, 78 I.D. 272 (1971), and cases cited therein.

The contestees argue on appeal that all of their claims should have been validated *in toto*. Contestees assert that the Judge gave too much weight to the testimony of the mineral examiner, Robert B. Wilson, who testified on behalf of the contestant. The Judge found, and his finding is supported by the record, that the mineral character of the land embraced within the claims in issue was only established in connection with the stone found on the quarry which extended at most into the two 10-acre subdivisions of both the Arizona Picture Rock No. 2 and the Arizona Picture Rock No. 5. Wilson testified that neither by physical exposure nor by geological inference could it be determined how far the stone extended laterally from the quarry, although it did extend to some degree. As noted in the decision of the Judge, this testimony was uncontroverted. Thus, we are of the opinion that the Judge properly found that contestees had not established a discovery except on those portions of the claims which the Judge validated. We dis-

agree with the argument made by contestees that the Judge gave too much weight to the testimony of the mineral examiner. Contestees' argument is subject to the same rationale set forth above. *State Director of Utah v. Dunham, supra; Forrest B. Mulkins, supra.*

The decision of the Judge is supported by the preponderance of the substantial and probative evidence. Nevertheless, the following excerpts of testimony are set forth, since they particularly buttress our findings.

Robert B. Wilson, the mineral examiner called by contestant, testified as followed on cross-examination by Lee Chartrand:

[Tr. 12]

Q. It is stated in this report that it's a common variety of sandstone over [sic] wide occurrence.

Do you say that this stone is found other places?

A. Well, the Coconino sandstone formation is exposed in northern Arizona from, I suppose, from around Holbrook as far west as Seligman, that's a matter of 150 miles or so, all along the Rim, and places in Gila County and it's been quarried in a great many places. I'd say it was a widespread occurrence.

Q. Would you say this particular color and design in stone is widespread?

A. This particular coloring, I call it a kind of a — some of it has almost a purple cast in the coloring, has a tendency to cross the bedding rather than be along the bedding, and that type of coloration is, well, it's not — does occur in other places. It's not widespread, no. This particular pattern of coloring is not particularly widespread.

* * * * *

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On recross-examination by Lee Chartrand, Wilson testified:

[Tr. 27]

Q. Mr. Wilson, what percent of the quarries in this Coconino stone would you say had the vertical coloring, would run vertically in the veins?

[Tr. 28]

A. Well, I couldn't say.

Q. Do you know of any that do?

A. That is exactly like yours? By vertical [sic] you mean across it, straight up?

Q. Not exactly straight up and down.

A. But almost. The coloring in this rock, the way it crosses the bedding, I don't know of any Coconino sandstone that has the coloration and the crossing of the bedding the way this particular stone of yours does, if that's what you mean.

Q. Yes.

A. I have seen it in the field where it wasn't being quarried. I have never seen the quarry that had this feature in the rock where the coloring crossed the bedding so pronouncedly as it does here. Usually it crosses it kind of sneaky and you mistake the coloring for the bedding; it is actually crossing the bedding.

* * * * *

On Examination by the Judge, Wilson testified:

[Tr. 137]

Q. Mr. Wilson, there's been testimony here that this type of coloration occurs in perhaps only five per cent of the total area of the Coconino flagstone deposit. Why would not the same type of weathering have occurred in the other areas, why only in this particular spot?

[Tr. 138]

A. I don't know about the percentage but I believe I testified when I was on the stand before that this particular type of coloration does occur in other places. Where the outcrops have been deeply weathered, it does occur.

Q. Is it your testimony that this similar type of coloration occurs generally throughout the flagstone deposits in Arizona?

A. No, no, only in those places where the rock has been exposed to weathering for a long time and certain minerals are necessary to produce this type of coloration.

Q. Is this then, a common phenomenon or an uncommon phenomenon throughout the flagstone deposit?

A. This type of coloration is relatively uncommon throughout the Coconino sandstone.

Q. What is the reason it is relatively uncommon?

A. That I couldn't say.

The testimony of the witnesses called by contestees was, as could be expected, even more favorable on the issue of the uniqueness of the stone in question. We are of the opinion that all of the testimony on this issue supports the finding of the Judge that the particular type of Coconino sandstone on portions of the Arizona Picture Rock Nos. 2 and 5 possesses a unique property. While most Coconino sandstone occurs in solid shades of one color or another, the stone in issue not only occurs in variegated bands of several shades of color but the colors also occur in veins which are characterized as being vertical, *i.e.*, generally running upward and crossing

the bedding rather than running parallel to the bedding. The occurrence of both of these properties in the same deposit of stone, as is evidenced by Contestees' Exhibits A, B, C, D, E, F, G, H, I, and J, gives the stone a unique property.

There was a considerable amount of testimony to support the finding of the Judge that the stone in issue commanded a higher price in the marketplace than other stone used for similar purposes.

Gage Keith Fink, whose business was the quarrying of different kinds of building stone, testified on direct examination by Lee Chartrand:

[Tr. 92]

Q. Did you ever try any sales of this stone on your yard?

A. Yes, we had one load of this stone in our yard. We sold one stone about the size of this larger one you split here today for \$75, and we got a premium price out of all of it. All the stone we had we got a premium price.

* * * * *

On cross-examination by counsel for contestant, Fink testified:

[Tr. 96, 97]

Q. Now, what would the price in the stone yard be for ashlar veneer?

A. You just sell the stone * * * I'd say this stone would probably sell for—it would have to be tried in that area, but we are getting \$50 for many stones that are not as near as pretty as this.

* * * * *

On examination by the Judge, Fink testified:

[Tr. 99]

Q. What is the significance in the marketplace of the swirling-type coloring that's displayed in this flagstone?

A. Its beauty.

Q. What does it do price-wise; how does it compare price-wise?

A. Oh, if you were to have an entrance put in a home and it would be the same as laying, almost, just laying cement, or laying something colorful, like laying a plain tile or a real decorative tile.

Q. I can appreciate that but what do people pay for one or the other? Is there a difference in the amount that they pay?

A. Definitely, definitely. In stones like this where we were selling retail at our yard flagstone at two cents a pound, we get five and six cents for this.

Q. Have you sold this type of stone for five or six cents a pound?

A. Oh, definitely, definitely.

Q. Whereas, you normally sell the solid-colored flagstone for two cents?

A. Two cents.

* * * * *

John J. Blakely, who had been in the materials and supply business for 39 years testified:

[Tr. 101, 102]

* * * * *

Q. * * * when this stone was shown to me I acquired some samples and immediately I sold it to some of my contractors * * * I contacted two or three of the people I knew * * * and one man * * * had an interest in a stone yard up in that area, [Pacific Northwest] he was in that area on a sales trip and he immediately looked me up and he wanted an exclusive setup to handle this stone in his area. He told me at the time that price really wasn't any object. He said that at that time that normal regular Coconino flagstone, which a good bit of it moves out of Drake-Seligman-Williams area,

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was bringing retail around \$80 a ton in the Bay area, which would be four cents a pound, and on the basis of this type of stone, if we could supply him, he could sell it at a premium of two or three cents a pound over this.

* * * * *

Finally, Hal Butler, whose primary business was in lumber, testified as follows on direct examination by Chartrand:

[Tr. 108]

* * * * *

A. * * * [Chartrand] had taken me out to the quarry, and being a salesman all my life I was immediately sold on what I had seen at the quarry. I went so far as to take samples of it * * * and on my calls to the customers in the lumber industry I would display, show them this. I didn't have a customer that I called on that didn't want truckloads of this rock.

So, on the basis of that I advanced Lee \$5,000 to get me out some rock because I could sell it nearly everywhere I went.

* * * * *

[Tr. 109]

* * * * *

Q. At the time I first showed you this and you contacted a few buyers, what did you give me an order for on this stone, how much did you give me? What order did you give me first?

A. I told you to get me out 100 ton immediately, that I had it sold, and it would bring approximately \$55 to \$60 a ton quarried, f.o.b. quarried.

It is conceded by contestant that a general market for stone exists in the area of the claims. Contestees, furthermore, presented receipts at the hearing showing actual sales of the stone. While these receipts only total between \$250 and \$300 the rec-

ord discloses that contestees had several tons of stone sorted and piled but were thwarted in their attempts to market the stone because someone blocked the access road which extended from the claims to the highway. It was uncontroverted at the hearing that the road was blocked by a timber contractor. The real bone of contention was whether the Forest Service authorized the blocking. In any event, we are of the opinion that the Judge properly found that the stone in issue could be marketed at a profit.

Although the Judge made no express finding that the land embraced within the validated portions of the claims was chiefly valuable for minerals under 30 U.S.C. § 161 (1970), we are of the opinion that such a finding is implicit in his decision. The only evidence presented by contestant on whether the claims in issue were chiefly valuable for minerals was the testimony of Leonard A. Lindquist, a timber staff officer of the Sitgreaves National Forest. (Tr. 41.) He testified that in his opinion the estimated value of the timber on all of the land embraced within the claims (560 acres) was \$166,000. Contestant argues that this testimony supports an inference that the value of the timber on the validated portions of the mining claims (40 acres) is \$11,440. Assuming *arguendo* that this inferred estimate were accurate, it must be inferred from the evidence that the value of the stone on the same 40-acre tract would far exceed \$11,440. The min-

eral report prepared by contestant states that the Coconino sandstone formation "ranges from less than 100 ft. to more than 500 ft. in thickness." Hal Butler testified that he advanced Lee Chartrand \$5,000 for a single order of the stone. (Tr. 108.) Butler stated that he placed an order with Chartrand for 100 tons of the stone, which Butler had sold, and that the 100 tons "would bring approximately \$55 to \$60 a ton * * * f.o.b. quarried." (Tr. 109.) Gage Keith Fink testified that he had sold the type of flagstone displayed at the hearing for five or six cents a pound and that solid-colored flagstone only sold for two cents a pound.

The Judge considered the testimony of Lindquist in connection with the value of the land for timber. He also considered the fact that the stone in issue occurred in sufficient quantities and could be marketed at a profit commanding a higher price than other stone used for similar purposes. Under the facts and circumstances in this case, we feel that the findings of the Judge support a conclusion that the land in issue is chiefly valuable for stone. See generally, *Burke v. Southern Pacific R. R. Co.*, 234 U.S. 669 (1914); *United States v. Zerwekh*, supra, at 175. See also 5 C.J.S. Appeal & Error § 1564(8).² In any

event, upon appeal from a decision of an Administrative Law Judge, this Board can make all findings of fact and conclusions of law based upon the record just as though it were making the decision in the first instance. *United States v. Middle-swart*, 67 I.D. 232 (1960); 5 U.S.C. § 557 (1970). We are satisfied from our review of all of the evidence that the land in issue is chiefly valuable for minerals.

Contestees have requested this Board to make a field examination of the claims to prove that all of the claims contain stone with unique coloration characteristics and patterns. It is not a function of this Board to make field examinations of mining claims. Contestees were afforded an opportunity to establish the mineral character of the claims at the hearing. Their failure to do so cannot serve as a basis for a further evidentiary hearing. The request is accordingly denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

FREDERICK FISHMAN, *Member*.

WE CONCUR:

JOSEPH W. GOSS, *Member*.

DOUGLAS E. HENRIQUES, *Member*.

EDWARD W. STUEBING, *Member*.

ANNE POINDEXTER LEWIS, *Member*.

² "Where the record does not contain express findings of all material facts involved in the case or conclusions of law, it will be presumed, on appeal, that the lower court found, in favor of the prevailing party, all the facts necessary for the support of the judgment."

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MRS. THOMPSON, DISSENT- ING IN PART

Insofar as the majority affirms that part of the Administrative Law Judge's decision finding that certain mining claims, or portions thereof, are null and void, I concur. I must dissent, however, with the majority's affirmance of the Judge's decision finding 40 acres within the Arizona Picture Rock Nos. 2 and 5 claims to have a discovery of a valuable mineral deposit.

My basic disagreement with the majority is to the factual findings pertaining to the stone within those 40 acres, and the inferences drawn from the evidence in the record concerning its value and the value of the land for other purposes.

The Building Stone Act of August 4, 1892, 30 U.S.C. § 161 (1970), authorizes location of mining claims for "lands that are chiefly valuable for building stone." By the Act of July 25, 1955, 30 U.S.C. § 611 (1970), "common varieties" of stone are no longer deemed a valuable mineral deposit within the meaning of the mining laws, but do not include "deposits of such materials which are valuable because the deposit has some property giving it distinct and special value." Prior to the 1955 Act, a deposit of building stone was not deemed a valuable mineral deposit under the mining laws unless there was satisfactory proof establishing that the deposit, though of commercial quality, could be marketed at a profit. *United States v. Estate of Victor E. Hanny*,

63 I.D. 369 (1956); *United States v. Strauss*, 59 I.D. 129 (1945). After the 1955 Act, it is necessary to establish not only that a deposit of building stone may be marketed at a profit and that the land is chiefly valuable for the building stone, but also that the deposit has "some property giving it distinct and special value." *United States v. Coleman*, 390 U.S. 599 (1968).

The Judge found that the contestant's evidence was sufficient to make a prima facie showing that the mineral materials on the claims are a common variety not subject to location under the mining laws, but that the contestees, by a preponderance of the evidence established the uncommon nature of the deposit of stone exposed in the quarry on the Arizona Picture Rock Nos. 2 and 5 claims. Specifically, he stated at 17:

Based upon all the evidence presented, I find that the stone in that quarry has a unique coloration characteristic which occurs in very limited areas of the widespread Coconino sandstone deposits. Because of this unique characteristic the stone commands a distinctly higher price in the market place over other stone used for the same purposes, giving it a special and distinct value, and qualifying it as an uncommon variety of stone under the law as set forth above. I further find that a market exists in Phoenix, Arizona, and other places where the stone from the quarry can be sold at a profit, and that a person of ordinary prudence would be justified in spending his time and money in developing the property as a mine.

He then discussed whether each ten-acre tract within the two claims was mineral in character and concluded that, at most, the uncommon

variety of stone extends into two ten-acre subdivisions of both the No. 2 and No. 5 claims, that neither by physical exposures nor geological inference could it be determined how far the stone extended laterally from the quarry. He concluded that the other stone on the claims was of the same character "as the stone found throughout the vast Coconino sandstone deposit" and is a common variety, no longer locatable under the mining laws. Although he discussed mineral character, he did not discuss whether the 40 acres found to be mineral in character were "chiefly valuable for minerals," nor did he analyze the facts or give any reasons for any conclusion that the lands are more valuable for the stone than for other purposes.

I believe one may only speculate as to the basic data and reasons to support the decisions of the Judge and the majority of this Board as to the 40 acres found to contain a valuable deposit of locatable minerals.¹

The majority glosses over the fact the Judge made no express finding that the land was chiefly valuable for building stone, although one of the charges of the amended complaint, and a material issue in the

case, was that the land within the claims is not chiefly valuable for minerals, by stating that such a finding is implicit in his decision. The majority alternatively makes its own finding that the land is chiefly valuable for minerals. I am unable to ascertain how such a finding can be made from the present record without assumptions and inferences not warranted from the evidence.

The Forest Service presented testimony of an employee, a forester, that the estimated value of the timber on the 560 acres embraced within all of the claims in the contest was \$166,000. As the Judge noted in his decision, the Forest Service's mineral examiner gave his opinion that none of the land within any of the claims was chiefly valuable for the mineral thereon. The Judge concluded that the Government's evidence made a *prima facie* case.

When the Government in a mineral contest makes a *prima facie* case as to the pertinent issues leading to the conclusion that the claim is invalid for lack of discovery of a valuable mineral deposit locatable under the mining laws, the contestee has the burden of proof to show with a preponderance of the evidence that there has been a discovery and the claim is valid. *Foster v. Seaton*, 271 F.2d 836 (D.C. Cir. 1959). The burden of proof goes to all of the elements essential to prove the validity of the claim. Thus, when the Government established *prima facie* that the land was not chiefly valuable for minerals, the contestee had the burden to show by a preponderance of the evidence

¹ The findings and the reasons for the findings and conclusions in an administrative determination should be clear so that a reviewing authority may "know the basic data and the whys and wherefores" of the conclusions. *Guam v. Federal Maritime Commission*, 329 F.2d 251, 255 (D.C. Cir. 1964), *further hearing*, 365 F.2d 515 (D.C. Cir. 1966), *cert. den.*, 385 U.S. 1002. There should not have to be speculation as to the basis for the conclusions in the decision, nor is a reviewing authority required to accept an agency counselor's *post hoc* argument at face value. *Northeast Airlines v. C.A.B.*, 331 F.2d 579, 586 (1st Cir. 1964).

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that the mineral value exceeded other values of the land. This burden has not been satisfied by the evidence in this case.

Although there was evidence as to a total timber value for the 560 acres of all the claims, the testimony pertaining to timber value was not broken down as to particular 10-acre subdivisions. In view of the Judge's conclusion that there was a locatable mineral on 40 acres, by hindsight the Forest Service should have detailed the evidence as to the timber value as to each particular 10-acre subdivision. There is, however, no specific evidence submitted by the contestee which would establish any estimated value of the mineral deposit within that acreage or any estimated value of timber or other nonmineral values of the land for that acreage. The majority in argument would accept the contestant's attorney's *post hoc* contention of an inferred proportionate timber value of \$11,440 for the 40 acres. As the variable as to the value of timber are so great over a given area, without further information than that in the record, I would not accept such an inference. The value could be significantly less than that if much timber has already been cut for the quarry, or it could possibly be more.

Of more importance in this case, I see no basis in the evidence for ascribing any significant mineral value greater than that, as the majority has done, to the deposit of stone within the quarry. The majority and the Judge have concluded

that the solid colored stone within the claims is a common variety within the meaning of the Act of July 23, 1955. To determine the value of the mineral deposit, therefore, no value can be given to that stone. An estimate of the value of the deposit must be based solely upon mineral still locatable under the mining laws. *United States v. Lease*, 6 IBLA 11, 79 I. D. 879 (1972); *United States v. Chas. Pfizer & Co., Inc.*, 76 I. D. 331 (1969), *reconsideration denied*, 6 IBLA 514 (1972).

Assuming *arguendo* that the variable colored stone is still locatable under the mining laws, what is a reasonable estimate of the quantity of that stone and what is the value of that quantity? These are difficult questions, of course, but the answer to these questions and to the value of the land for non-mineral purposes must be given in order to make a proper determination that the land is chiefly valuable for building stone.

The report of an examination of the claims by the Forest Service's mineral examiner, Robert B. Wilson, was submitted as Contestant's Exhibit #2. In this report, Wilson described the geology of the area, and stated in part as follows:

The Coconino sandstone formation is a uniformly, medium-grained, well-cemented, white, pink and brown to red colored, cross-bedded sandstone of Permian Age. * * * It ranges from less than 100 ft. to more than 500 ft. in thickness and underlies the whole of the Coconino plateau where it crops out over wide areas in Mojave, Coconino, Yavapai,

Navajo and Gila Counties from as far east as Holbrook to as far west as Seligman. * * *

Most, if not all, of the presently operating Coconino sandstone quarries are located in the vicinity of Ashfork, Arizona, where a wide range of colors can be obtained and the cost of quarrying and transportation is as low as any in the industry.

* * * * *

In general, the sandstone exposed on the [subject] claims is a rather thick-bedded, medium to fine grained, light brown to dark red rock that has little tendency to split along the bedding. *However, there are a few zones of cross-bedded rock in which the individual beds range from less than one inch to around 15 inches in thickness. These cross-bedded strata contain sharp bands of contrasting colors that have a strong tendency to cut across the bedding.* The most pronounced coloring is found in Working No. 3 on the Arizona Picture Rock No. 2 claim where it produces the effects shown in Photos Nos. 13 and 14 of Attachment No. 1c. It is this type of coloring that has led the claimant to believe the rock is an unusual variety. [Italics added.]

It is only the stone described in the italics deemed by the Judge and the majority to be an uncommon variety. The report does not support any inference, as implied by the majority, that such stone is within a 100 to 500 feet thickness of the total Coconino sandstone formation which covers a wide area throughout Arizona. If it were so extensive, it would be in such quantities that it would have to be determined a common variety. *Cf. United States v. Brubaker*, 9 IBLA 281, 80 I.D. 261 (1973). Actually, a fair reading of the quoted portion of the mineral report indicates that there are only

a few zones of this variegated rock in thicknesses from less than one inch to around 15 inches in thickness. The Judge indicated there were some 100 tons of stone quarried and guillotined and placed on pallets ready for delivery. In the mineral report of the Government's witness, it was stated that as of September 24, 1968, no more than 125 cu. yds. of stone had been removed from rock in place in working no. 3, the quarry in question (Contestant's Ex. 2, at 6). Nothing in the record establishes how much more of the variegated colored stone can reasonably be estimated to be within the 40 acres adjudged to be mineral in character.

With regard to any value of the stone, the majority relies on testimony which is primarily conjectural in nature. None of this testimony establishes any in-place value of the stone. It all relates to possible retail prices rather than quarry prices. The majority emphasizes testimony by Hal Butler concerning an advance to Lee Chartrand of \$5,000. Unfortunately the testimony concerning this advance is somewhat confusing and unclear as to the actual terms of the transaction between Butler and Chartrand. There was no corroborative evidence by way of canceled check, copy of a contract, etc. It is not clear from the testimony that the amount represented any sale price for 100 tons of stone at the quarry, as the majority implies. Indeed, Butler's testimony is that 100 tons should be taken from the quarry immediately

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"that I had it sold, and it would bring approximately \$55 to \$60 a ton quarried, f.o.b. quarried." (Tr. 109.) There was no clarification as to these terms. It would appear that the \$55 to \$60 represented the price the buyer would pay him for the stone—not what he would pay Chartrand. In any event, the sales were not made, with Chartrand trying to place the blame for this upon the Forest Service, as will be discussed further, *infra*. Our further discussion as to market value of the stone establishes that there is no probative evidence which would support a conclusion that the land is chiefly valuable for the stone.

We turn now to the most critical question in this case, i.e., whether the stone is a common or uncommon variety of building stone. I believe the Judge misstated the testimony of the Forest Service's witness, Wilson, in saying that he "knows of no other Coconino sandstone that has a comparable coloration characteristic." The entire testimony of Wilson reveals that there is a wide variety of variegated colored stone in the Coconino sandstone formation, and although the witness had seen no other quarry having similar type of vertical-patterned rock, he had observed similar rock exposed between Heber and Long Valley. In addition to the testimony quoted by the majority, see also other testimony at Tr. 26-29, 138-39.

Testimony of contestees' witness Gage Keith Fink indicates that there are other stones, schist and quartz-types, used for the same pur-

poses as the stone from their claims which have varied color patterns (Tr. 95). He stated that although the schist-type stone is not limited quantity-wise, as a decorative stone it is limited to a mosaic-type pattern (Tr. 96). He also testified:

* * * I am not aware of any quarry that produces exclusively multi-color flagstone. However, there are quarries that occasionally get a swirl or two in them, not pronounced like this, but there are maybe two shades of color in a piece of stone; this happens quite often but I'd say easily 95 percent of the flagstone quarried in Arizona is of a solid color, one color, and usually used in the patio, or cut guillotined for your other type of veneer stone. (Tr. 98.)

Another witness of contestees, John J. Blakeley, who is in the building materials and supply business in Phoenix emphasized the beauty of the stone (Tr. 102).

From my review of all of the evidence in the record it appears that variegated coloration in pattern effects in building stone generally is not unusual by itself although the frequency of occurrence is less than the occurrence of solid color building stone, at least, of the sandstone in the Coconino formation. The summary of evidence by the Judge failed to include any of the testimony concerning building stone generally but was limited to the Coconino sandstone. This is apparent also from his summation of the evidence concerning the market for the material.

The Judge and the majority give lip service to the test in *United States v. Minerals Development*

Corporation, 75 I.D. 127 (1968), that where a deposit of stone is used for the same purposes as other materials of common occurrence, the property deemed to make the deposit have a "distinct and special value" must command for the stone a significantly higher price in the market place than the common varieties of stone.²

I do not believe the contestees met their burden of proof to establish that the stone has a unique property which gives it a distinct and special value. I disagree with the findings that the preponderance of the evidence established that the variegated coloration gave the stone a distinct and special value as reflected in the market price.

² Dictum in *McClarty v. Secretary of Interior*, 408 F.2d 907, 909 (9th Cir. 1969), states that the market criteria outlined in the *U.S. Mineral Development* test " * * cannot be the exclusive way of proving that a deposit has a distinct and special economic value attributable to the unique property of the deposit." The court then suggests that special and unique properties of the stone may give it an economic value not measurable by the retail market price. For example, a unique property may reduce the costs or overhead which would result in an increase of profit for the producer even though the market price of the stone would be no higher than the other varieties of building stone. Since the Court's decision in *McClarty*, however, this Department has adhered to the view in the *U.S. Mineral Development* case that the market place price is the significant factor in determining whether the unique property imparts a "distinct and special value" to the deposit where the material is sold for the same uses as common varieties of the mineral. *The Atchison, Topeka & Santa Fe Railway Company v. Cox*, *United States v. Cox*, 4 IBLA 279 (1972); *United States v. Thomas*, 1 IBLA 209, 78 I.D. 5 (1971); *United States v. Rogers*, A-31049 (March 3, 1970); *United States v. Chas. Pfizer & Co., Inc.*, 76 I.D. 331, 346 (1969). In any event, there is no showing here that there would be any economic advantage in the *McClarty* sense due to the physical property of the stone.

It is difficult to determine what weight the Judge gave to the testimony of the witnesses in this case and to other evidence presented as he only summarized the evidence and stated his conclusions. As indicated, he made no analysis of the evidence or offered any reasons for his conclusions.

The majority finds that there was a "considerable amount of evidence" to support the Judge's finding that the stone in issue commanded a higher price in the market place. Let us consider this evidence.

Fink testified that at retail outlets in Phoenix building stone of types that included jasper, onyx, quartz, sandstone, epidote, schist and others sold from \$35 a ton to \$200 a ton for a "real good rose quartz or some with a lot of pyrites" (Tr. 90). One load of stone from contestees' quarry was sold in his yard with one large stone selling for \$75, and a premium price for "all of it" (Tr. 92). There were no receipts to corroborate this. As to the rock displayed at the hearing, he thought it would command a price of \$50 (Tr. 93). Although he has been out of the business for a year and half, he stated that flagstone had been selling for two cents a pound, but the type of stone shown at the hearing could get five and six cents (Tr. 99). On a ton basis this would be a difference between \$40 and \$100 to \$120 a ton.

Blakeley, through his "lumber connections in the Bay area," met the sales manager for one of the largest manufacturers of power poles

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in the Bay area, who has an interest in a stone yard. He wanted an exclusive setup to handle the stone in his area (Tr. 101). Blakely's contact told him that regular Cocoino flagstone was bringing retail around \$80 a ton in the Bay area, or four cents a pound, and that he could sell this stone, by selecting and grading it, at a premium of two to three cents a pound over this (Tr. 102). Although Blakely said he had customers for the stone, he had no idea how much stone could be sold. He stated:

A good many projects have been completed in the last two years' time here and those buildings are built once, never again. So, whatever comes up in the future, in other words, I have no way of looking into that with my crystal ball, but it has a terrific potential. (Tr. 103.)

I have already mentioned the testimony of another witness of contestees, Lee Butler, whose business is lumber. He showed samples of stone from the quarry to other lumber dealers and his thwarted sales of stone were to such dealers (Tr. 109).

In contrast to the optimistic statements as to what the stone might bring in the retail market place, actual sales receipts submitted at the hearing show a different picture. Although there is little foundation evidence to support them, the receipts or invoices are compiled together as Exhibit K. Although the Judge stated there were ten invoices totaling \$286.72, one is actually a duplicate billing statement of the same invoice (No. 6816) for

\$24.72, including 72 cents tax. With the one duplication subtracted, our total of the receipts is \$262 without sales tax, or \$264.23 with the tax added. This still leaves a minor discrepancy with the Judge's computation, which apparently was in error. The dates of these items, description, and price (with tax stated when given on receipt) are as follows:

1. 10-28-67—1½ building stone	
at \$45 per ton.....	\$67.50
21 sq. ft. of hearth	
stone at \$2.50.....	52.50
	<hr/>
	120.00
less a 30% discount....	-36.00
	<hr/>
	84.00
2. 4-15-69—2 ton picture rock-	
flagstone	100.00
3. 6-21-69—1½ sq. ft. flagstone..	2.00
tax06
	<hr/>
	2.06
4. 7-14-65—2 rocks at 1.25.....	2.50
tax08
	<hr/>
	2.58
5. no date—King-Ferris Supply	
Company, 1 piece	
flagstone	7.50
6. 8-10-69—20 lbs. picture flag	
stone rubble at	
0.5	1.00
1 pair matched	
pieces split flag-	
stone (Picture	
flag)	10.00
tax44
	<hr/>
	11.44
7. 3-1-67—20 sq. ft. mantle rock	
at 1.25.....	25.00
tax75
	<hr/>
	25.75

8. 9-10-68—(same duplicate bill- ing), King-Ferris Supply Company, Invoice No. 6816, 2 18 x 36 sand- stone 1 24 x 24 " 3 2 x 1 " 1 1 x 1½ " 16 sq. ft. at 1.50_ \$24. 00 tax ----- .72 24. 72	
9.	4 sq. ft. sandstone at 1.50----- 6. 00 tax ----- .18 \$6. 18

The prices in the items listed apparently are the retail prices, not the price at the quarry. Except possibly for item 5, one piece of flagstone for \$7.50, and item 6 one pair of matched pieces of split flagstone (picture flag) for \$10, none of the other items reflect prices higher than the price of ordinary stone used for the same purposes. It is difficult, however, to evaluate the sales of the pieces of stone where a weight is not given since the usual comparison is on a per pound or per ton basis. This is true also with respect to the three other sales of single (or paired) stones noted by the Judge at \$15, \$30, and \$75, which were not corroborated by sales receipts. Those for which there were sales receipts (evidently the same type of picture stone) sold for much lower prices than the three sales which were not so corroborated.

It is evident that the primary use for which the material is expected to be sold is for traditional con-

struction purposes for which common varieties of building stone can be used such as inside and outside veneering of homes and other buildings, landscaping, fireplace and patio construction. Contestees also urge that the stone can be used for floor and wall tile, for art pieces which can be mounted and displayed like pictures, and ornamental objects such as lamp posts and bases. Except for the art pieces, the record does not establish that these other alleged uses are uses for which other common varieties of stone could not be put. For example, although a pleasing color of stone would be a factor in choosing stone to make a lamp or other decorative object, such an attribute may be found in common varieties of stone. The inherent value of the object would be due to the labor and skill in making the object rather than the inherent value of the raw material itself unless a higher price could be obtained for the raw material. As stated in *McClarty v. Secretary of Interior, supra*, at 909, the mineral deposit must have the unique property and not "the fabricated or marketed product of the deposit."

The evidence as to sales of stone for art pieces is not convincing. The highest alleged value received for an individual piece (or pair achieved by splitting the stone) was stated by Blakeley to be \$75. There is no other information concerning that stone. That price is significantly different from the \$30 for the split stone shown on exhibit D (Tr.

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69), which is also significantly different from the \$15 received for a somewhat similar stone in size and coloration shown on exhibit C (Tr. 67-68). There is more difference in the prices received for these stones than for the alleged difference in the estimated prices that can be received for the stone as compared with ordinary flagstone as stated by contestees' witnesses. At most, these sales show that the price may depend greatly upon the buyer's inclination, and the fact that it is a negotiated price. There is certainly no evidence to support any finding that the stone can be marketed profitably for art pieces, and these few isolated sales are not sufficient to establish a unique use to satisfy the "distinct and special value" test. *United States v. California Soyland Products, Inc.*, 5 IBLA 179, 193 (1972).

In analyzing the evidence as to the sale of the material for building and decorative work, I find there is a distinction between the testimony of contestees' witnesses as to any actual sales of the material and the possible value of the material in the market place. Testimony as to what market conditions might be, in contrast with evidence of what sales have been made, is simply opinion evidence.

Even if we consider all of the witnesses for contestees as experts regarding stone, although three of them testified they were primarily in the lumber business, rather than the stone business, there is little probative evidence to support their

opinions that the stone has a distinct and special value in the market place, and that it can be marketed profitably. The price Fink estimated could be received for the stone as flagstone was in the middle range for building stone. Although he was optimistic about the "terrific" market potential, he could not state what the present or future market could be. Any opinion by Blakeley as to a market in the California Bay area is based upon hearsay, what one of his lumber contacts in California told him the price for the stone should be in that area in comparison with the price for ordinary Coconino sandstone being sold there. He agreed the price customers are willing to pay for the stone to a great extent is dependent upon which type of rock they prefer (Tr. 104). The essence of his testimony is because he and some of his lumber contacts liked the stone it should command a higher price than ordinary stone. Is such testimony a sufficient basis for a conclusion that the stone has a distinct and special value because it can be sold at a distinctively higher price than ordinary sandstone? I think not.

I realize the difficulties of proof in establishing a "distinct and special value" of stone where the special property allegedly giving it that value is a variegated coloration and the vagaries of the market place are dependent upon the aesthetic tastes of the potential buyers and, undoubtedly, upon the marketing skills of the sellers in large part. For this reason, where the facts of

actual sales corroborated by some documentary proof reflect an entirely different picture from that based upon mere opinion alone, the opinion testimony cannot be given the same weight as where the opinion testimony is corroborated. The actual sales prices shown in the evidence, with the exceptions noted previously, were no higher and possibly less than the market place price for common varieties of stone. The evidence also supports an inference that the variegated coloration pattern might be a negative factor in marketing as well as a plus factor due to the difficulties in achieving uniformity of patterning (Tr. 105-107). This would be true where a large volume of stone would be desired rather than one or two pieces.

In short, I have weighed all of the evidence in the record and must reach a different conclusion from that reached by the Judge and the majority as to the "distinct and special value" of the stone and the marketability at a profit. The documented facts as to market prices and conditions support the opinion testimony of the Government's mineral examiner that the stone does not have a unique property giving it a distinct and special value, but do not support the conflicting opinion testimony of contestees' witnesses. Some of the price estimations of contestees' witnesses are not of a price which is significantly higher than that for which common varieties of stone can be sold. Other estimations are merely optimistic spec-

ulations of a possible potential market and possible prices. Since a speculative market is not sufficient to establish marketability as indicated in *Barrows v. Hickel*, 447 F.2d 80, 83 (9th Cir. 1971); see also *United States v. Stewart*, 5 IBLA 39, 79 I.D. 27 (1972); *a fortiori*, a finding as to a distinct and special value must rest on more than mere conjecture and speculation.

Therefore, there is no basis for finding that the stone deposit within the W $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 3 is an uncommon variety, and I would reverse the Judge on this point, or require a further hearing before deciding the issue finally.

I also disagree with the Judge's and the majority's finding that a prudent man could expect to market the stone at a profit. In addition to establishing that there is a market, this requires an analysis of the claimant's expected monetary returns with his expected costs. *Adams v. United States*, 318 F.2d 861 (9th Cir. 1963). The evidence in this regard is not persuasive. All of the evidence concerning retail prices did not reflect the actual money to be received at the quarry. There is little information on this. This might vary depending on whether the claimant or his purchaser were to pay the transportation costs, the cost of loading and unloading. Fink testified that he figured the price of quarried stone at \$15, with his truck hauling it, and the quarrymen loading the truck (Tr. 94, 100). His hauling costs were \$6 a ton into the Phoenix area (Tr. 94). It is not

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apparent how this cost is broken down, i.e., if it includes labor as well as gasoline and maintenance costs of the trucks and any capital amortization for the cost of the trucks. Fink also testified that it might be necessary in quarrying flagstone to quarry 400 to 500 tons to obtain 100 tons of 1 inch thick stone (Tr. 98). There is little probative evidence which would support a conclusion that the stone from the claims can be marketed at a profit.

Contestees contend that they were prevented from establishing proof of the marketability of the stone because the Forest Service prevented them from doing so. The record shows a letter from Forest Service personnel to Lee Chartrand advising him that there was no locatable mineral on the claims and that he should not remove it (Ex. L). Chartrand testified that the access road to his claims was blocked and this prevented him from getting to the claims (Tr. 111-113). Witnesses of the Forest Service denied blocking the road but stated that a timber purchaser may have done so under the terms of his timber sale contract which contracts generally provide for closing roads built for timber sales after the timber is removed. Although Chartrand was offered a special permit to remove the material pending this contest with the money to be placed in escrow depending upon the outcome (Ex. 6), he refused to do so. The notice or warning by the Forest Service that the stone is a common variety does not relieve the claimants of the bur-

den of showing that the stone can be marketed at a profit. *Of. Barrows v. Hickel, supra*, at 84, citing an earlier decision in the same case, *United States v. Barrows*, 404 F.2d 749, 752 (9th Cir. 1968), *cert. den.*, 394 U.S. 974 (1969), which held that a court injunction preventing removal of material from a claim could not be permitted to prejudice the Government's asserted rights to a mining claim.

It appears that the Judge and the majority of this Board have been swayed in their conclusion in part, although not expressly articulated, by this alleged thwarting of the sale of the 100 tons of stone under the alleged arrangement with Butler. Lee Chartrand refused to go into any type of arrangement with the Forest Service to permit him to remove the stone with the money to be placed in escrow, stating that this would be an admission that the stone is not locatable. Where there is a controversy as to whether a stone deposit is of a common or an uncommon variety, we would not consider a claimant who enters into such a contractual arrangement with the Forest Service pending resolution of a contest as admitting that the stone is a common variety. Such an arrangement would be advantageous because the claimant could extract and sell the stone about which there is a controversy and by his sales have evidence as to the value of the stone on the market place. In view of the difficulties of proof inherent in a determination as to "distinct and special

value" such an arrangement might well afford a claimant an opportunity to establish clear proof of value in the market place. If the variegated coloring of this stone is so highly desirable that it can actually capture a higher price in the market place, I believe a further hearing in this case would be useful to afford the claimant the further opportunity of making an arrangement with the Forest Service to remove the stone and market it to establish the "distinct and special value." A further hearing would also afford the parties the opportunity to supply the deficiencies in the proof concerning profitability of the operations, and concerning whether the land is chiefly valuable for the building stone.

I cannot, however, on the basis of the present record sustain the Judge's findings on these matters, nor can I conclude that the claimant has met his burden of proof by establishing a preponderance of evidence on the crucial issues in this case. The credibility of the witnesses' testimony and the weight to be given to that testimony in this case is not fully dependent upon their demeanor. Furthermore, review by federal administrative agencies of their Judges' (hearing examiners) decisions is not the same as federal appellate court review of lower court findings, and the administrative agency may weigh all of the evidence to make its decision and reverse a Judge's findings on the evidence even where credibility and demeanor of witnesses are involved. *F.C.C. v. Allen-*

town Broadcasting Co., 349 U.S. 358, 364 (1955).

I would not defer to the Judge's findings in this case where there is so little basis to support them and where there is an absence of findings and reasons on some of the material issues of the case. Furthermore, I cannot concur in the majority's findings for the same reason.

This Department has recognized many times that the sale of minor quantities of material at a profit does not demonstrate the existence of a market for the material which would induce a man of ordinary prudence to expend his means in an effort to develop a valuable mine on the claim. *United States v. Edwards*, 9 IBLA 197 (1973), and cases cited therein.

In this case not only is the evidence lacking that the few sales were made at a profit, but the actual sales did not establish that the stone commanded a higher price in the market place as required to establish that it is an uncommon variety of stone. I would not rest a determination that the stone in this case has a distinct and special value and is marketable at a profit merely upon conjectural and speculative opinions, contradicted by other opinion and by specific proof of sales. I would require the claimants in order to meet their burden of proof in this case where value is dependent upon aesthetic tastes and not upon any firm marketplace standards to show more definite evidence of actual market transactions which would corroborate the opinions expressed that it could be sold for higher

June 25, 1973

prices than common varieties of stone and to show more evidence as to profitability. In the absence of such proof, I would conclude the claimants have not established their preponderance of evidence in a case of this type.

Therefore, I would reverse the Judge's decision as to the 40 acres for the reason the claimants have not met their burden of proof. Alternatively, in view of the ambiguities in the proof as to other issues and the claimant's alleged inability to consummate a sale of the stone because of the blocking of the road and Forest Service warnings, I would remand the case for a further hearing on all of the material issues which must be resolved before a final determination that any of the claims is valid.

JOAN B. THOMPSON, *Member*.

I CONCUR:

MARTIN RITVO, *Member*.

Mr. Frishberg, dissenting in part:

I concur in that part of the majority and dissenting opinions affirming Judge Luoma's decision holding Picture Rock Claims Nos. 1 through 7, Arizona Picture Rock Claims 1, 3 and 4, and portions of Arizona Picture Rock Claims 2 and 5 null and void. I also agree with the majority's conclusions that the building stone found in that 40 acres possesses a property giving it a distinct and special value and, hence, is locatable. 30 U.S.C. § 611

(1970). However, I dissent from the majority's affirmation of the holding below that 40 acres within Arizona Picture Rock Nos. 2 and 5 contain a discovery of a valuable mineral deposit.

I share the dissatisfaction of Mrs. Thompson and Mr. Ritvo with the majority's treatment of the failure of the Judge to find that the land is chiefly valuable for building stone. As pointed out in the dissent, such a conclusion is required by 30 U.S.C. § 161 (1970). Contestant alleged that the land is not chiefly valuable for building stone. Accordingly, once the Judge held that the building stone on 40 acres was locatable and that such stone could be marketed at a profit, he was required to find that the land was chiefly valuable therefor before concluding that a discovery existed. He did not do so, nor does the record support such a conclusion.

Accordingly, I would reverse the decision below as to the 40 acres in question and remand for further hearing, directing that the parties be ordered to present detailed evidence on 1) the highest value of the 40 acres involved for other purposes, including but not necessarily limited to the value of the timber thereon, and 2) the value of the locatable building stone thereon. In order to determine the latter, it is necessary to ascertain the amount of such stone on the claims, the cost of its extraction, removal and sale, and its selling price. While there is evidence as to the selling price of the stone, there is little in the record, as

pointed out by Mrs. Thompson, as to its total amount or as to the cost of marketing it.

I am aware of the hardship imposed by a remand. (Hearings and appeals cost time and money. Moreover, their lack of finality is highly frustrating. Nevertheless, before the Secretary may divest the Government of its land, he must satisfy himself that all statutory standards are met. So too, therefore, must this Board and the Administrative Law Judge. That the contestee preponderates or is more persuasive than the contestant does not necessarily mean that all statutory requirements are met. Were this a proceeding wherein only the contestee appeared, he would still be required to present evidence sufficient to satisfy the pertinent statute before a patent could issue. He has not done so, nor has he been required to do so in this case.

NEWTON FRISBERG, *Chairman.*

PREMIUM COAL COMPANY

2 IBMA 148

Decided *June 29, 1973*

Bureau of Mines appealing an initial decision issued on February 7, 1973, to the limited extent that it vacated a Notice of Violation of 30 CFR 75.400 alleged in a section 109(a) proceeding under the Federal Coal Mine Health and Safety Act of 1969. (Docket No. below DENV 73-24-P.)

Decision Modified.

Federal Coal Mine Health and Safety Act of 1969: Hearings: Decisions

A Notice of Violation of 30 CFR 75.400 will be upheld where the unrefuted testimony of the Bureau of Mines Inspector shows an accumulation of float coal dust in a belt conveyor entry.

APPEARANCES: William H. Woodland, Esquire, in behalf of appellant, U.S. Bureau of Mines.

OPINION BY THE BOARD INTERIOR BOARD OF MINE OPERATIONS APPEALS

Procedural and Factual Background

On April 7, 1971, Bureau of Mines Inspector Jensen L. Bishop conducted a spot inspection of Premium Coal Company's (Premium) Soldier Canyon Mine pursuant to the Federal Coal Mine Health and Safety Act of 1969 (hereinafter the Act).¹ The inspector issued Notice of Violation No. 1 JLB after discovering float coal dust deposited on the top of rock-dusted surfaces at the No. 3 belt conveyor drive. The Notice contained the following:

Dangerous amounts of float coal dust were present around No. 3 belt conveyor drive and for a distance of approximately 100 feet along the belt conveyor entry.

¹ P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

June 29, 1973

A hearing on the merits was held on December 12, 1972, and a decision was issued on February 7, 1973, which involved the subject Notice of Violation, as well as numerous others. With respect to this Notice the Decision states at page 7:

*** He [the inspector] stated that the condition was abated and the accumulations of float coal dust were rendered inert by the application of additional rock dust. Presumably, the accumulations of float coal dust were not such as to warrant a clean-up operation.

Accordingly, I conclude that there was not a violation of 30 CFR 75.400.² The notice of violation is vacated.

Counsel for the Bureau of Mines filed a Notice of Appeal with the Board on February 28, 1973. The Bureau's brief was timely filed.³

Issue Presented on Appeal

Was the Notice of Violation of 30 CFR 75.400 properly vacated?

Discussion of the Issue

The Board believes that the Decision misconstrues the requirements of 30 CFR 75.400 to the extent that it lays decisional emphasis upon the method of "abatement" of the condition rather than on the facts associated with the condition itself. The primary issue for determination is whether an accumulation of coal dust or float coal dust had been permitted in an active

working by the operator. Section 75.400 of Part 30 CFR, which pertains to this point, contains the following standard:

Coal dust, including *float coal dust* deposited on rock-dusted surfaces, loose coal, and other combustible materials, *shall be cleaned up and not be permitted to accumulate in active workings*, or on electric equipment therein. (Italics supplied.)

The inspector observed the following conditions near the No. 3 belt conveyor:

*** an excessive amount of float coal dust deposited on top of the rock-dusted surface. ***

[It] was quite heavy at the belt conveyor drive. ***

[I]t got a little lighter for a distance of 100 feet. (Tr. 12.)

He surmised that the conveyor belt, itself, was the source of the float coal dust, and he differentiated the float coal dust from the underlying rock dust by "tracing through the accumulation" and observing the lighter color beneath. (Tr. 13). He stated that visual observation by an inspector is the only available method to determine the presence of float coal dust, unless the accumulation is deep enough to permit sampling and testing. (Tr. 18.) The inspector's testimony was unrefuted by Premium.

The Board concludes from the foregoing that the Bureau proved by a preponderance of the evidence that a violation of 30 CFR 75.400 had occurred.

Section 109(a)(1) of the Act requires that in determining the amount of the appropriate civil

² 30 CFR 75.400 contains the standard expressed in section 304(a) of the Act, which is set out *infra*.

³ Premium Coal Company, appellee in this case, has not participated in the appeal.

penalty, the Secretary of the Interior shall consider six criteria. In so doing, as delegate of the Secretary, we make the following findings of fact: (1) Premium Coal Company does not have a significant history of prior violations of the Act (Decision, hereinafter Dec. 5); (2) a penalty of \$50 is appropriate with regard to the size of the business of the operator (Dec. 6); (3) the record is inadequate to determine whether the operator was negligent in permitting the accumulation to occur, and, therefore, he is deemed not to have been so (Dec. 17); (4) the imposition of a \$50 penalty will have no negative effect on the operator's ability to continue in business (Dec. 6, Respondent's Exhibit B); (5) the violation is moderately grave, because the accumulations of coal dust were near to a source of ignition, and the mine was not equipped with deluge water sprays; however, there was no methane gas present (Tr. 14); (6) the operator complied with the Notice of Violation by abating the conditions rapidly and in good faith. (Tr. 8.)

Because the Board's findings and conclusions above are dispositive of this case, we need not reach other issues raised by the Bureau in its appeal.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision issued February 7, 1973, IS MODIFIED

to the extent that Notice of Violation No. 1 JLB IS REINSTATED, and that Premium Coal Company IS ASSESSED \$50 to be paid 30 days from the date of this decision.

C. E. ROGERS, JR., *Chairman.*

DAVID DOANE, *Member.*

SPRING BRANCH COAL COMPANY

2 IBMA 154

Decided June 29, 1973

Appeal by Spring Branch Coal Company from a decision by Administrative Law Judge William Fauver (PIKE 72-86-P), dated February 1, 1973, assessing a civil monetary penalty of \$3,000 for five violations of the Federal Coal Mine Health and Safety Act of 1969.

Affirmed.

Federal Coal Mine Health and Safety Act of 1969: Hearings: Generally

A penalty proceeding before an Administrative Law Judge is a *de novo* proceeding in which the amount of a penalty assessed is determined on the basis of the evidence presented without regard to any assessment proposed by the Assessment Officer.

Federal Coal Mine Health and Safety Act of 1969: Penalties: Amounts

It is not merely the fact that an alleged violation is cited as a part of an imminent danger order of withdrawal, but the degree of danger created by the violation either standing alone or in combination with other cited violations which is determinative of the statutory criterion of gravity.

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Federal Coal Mine Health and Safety Act of 1969: Appeals: Generally

The Board will not disturb a finding of an Administrative Law Judge in the absence of a showing that the evidence compels a different finding.

APPEARANCES: Joseph W. Justice, for appellant, Spring Branch Coal Company; Robert W. Long, Associate Solicitor, J. Philip Smith, Assistant Solicitor, John H. O'Donnell, Trial Attorney, for appellee, U.S. Bureau of Mines.

OPINION BY THE BOARD INTERIOR BOARD OF MINE OPERATIONS APPEALS

Factual and Procedural Background

On February 18, 1971, an inspection was conducted of Mine No. 9

operated by Spring Branch Coal Company (Spring Branch) which resulted in the issuance of an "imminent danger" order of withdrawal pursuant to section 104(a) of the Federal Coal Mine Health and Safety Act of 1969 (the Act).¹ The Bureau of Mines (Bureau) filed a petition for assessment of civil penalties pursuant to section 100.4 (i) of Title 30, Code of Federal Regulations on November 9, 1971, for six alleged violations of mandatory safety standards involving five different sections of the Act, described in the aforesaid withdrawal order. A hearing was held on August 16, 1972, and on February 1, 1973, the Administrative Law Judge (Judge) issued a decision vacating an alleged violation of section 304(d) and assessing the following penalties:

Order No. 1 EJH, February 18, 1971

Subparagraph	Section held to be Violated	Subject Matter	Assessment
1-----	303(b)-----	Ventilation standard for Crosseut.	\$300
1-----	303(b)-----	Ventilation standard for Working Faces.	300
3-----	302(a)-----	Roof Control-----	1,000
5-----	304(a)-----	Accumulation of Coal Dust-----	1,000
6-----	305(k)-----	Insulation and Support of Power Wires.	400
Total-----			\$3,000

Contentions of the Parties

Spring Branch contends that the findings of violations were not supported by the record and that the Judge failed to consider adequately

the criteria required for determining the amount of a civil penalty under section 109(a) (1) of the Act. The operator also alleges that the

¹ P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

Judge was arbitrarily and unduly influenced by the fact that these violations were cited in an "imminent danger withdrawal order." Spring Branch maintains that this is demonstrated by the fact that the penalty assessed by the Judge was \$2,000 higher than the Assessment Officer's proposal.

The Bureau maintains that the record supports the Judge's decision and that there is no basis for the contention that the Judge was influenced by the order of withdrawal.

Issues Presented

I

Whether the evidence supports the Judge's findings of violations and the penalties which he assessed therefor.

II

Whether the Judge was unduly influenced by the fact that the violations were cited in a section 104(a) order of withdrawal.

Discussion

Upon careful review of the record in this matter, the Board finds that the decision issued by the Judge is clearly supported by the record. Each finding of violation is supported by credible testimony and the penalties assessed reflect a reasonable consideration of the statutory criteria.

Since a hearing before an Administrative Law Judge is a *de novo* proceeding, the penalties are fixed

on the basis of the evidence presented irrespective of any prior proceedings.²

The Board is not persuaded that the Judge was unduly influenced by the fact that the violations cited resulted in an order of withdrawal. Although we agree that it would be improper to impose a higher penalty solely because the inspector cited an alleged violation in a section 104 (a) order, similar factors which bear on the existence of imminent danger are related to a proper consideration of the gravity of such violation. If a violation either standing alone or in combination with other violations creates a condition which "could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated" (section 3(j) of the Act), it should be considered more dangerous or of greater gravity than a violation (or combination of violations) which does not cause such a condition.

The determining factor in con-

² Throughout the proceedings below, this matter was governed by 43 CFR 4.544(a) (re-designated as section 4.546(a) on June 28, 1972) which provided that the Board or an Examiner (now Administrative Law Judge) should assess a penalty after consideration of the record and the criteria established in section 109(a)(1) of the Act. The actions of the Assessment Officer are not part of the record. On April 24, 1973, this section was deleted and section 4.545 was amended to include the following under subsection (c): "In determining the amount of civil penalty warranted the Administrative Law Judge and the Board of Mine Operations Appeals shall not be bound by a recommended penalty of the Bureau or by any offer of settlement made by either party." The new language of section 4.545 is even more explicit in its mandate that proceedings before the Office of Hearings and Appeals are independent of any prior determinations.

June 29, 1973

sidering the gravity criterion in a penalty case is not the fact that the violation is cited in an order of withdrawal, but rather the degree of seriousness of the condition created by the violation. *Eastern Associated Coal Corporation*, 1 IBMA 233, 236, 79 I.D. 723, 726-727, 2 CCH Occupational Safety and Health Guide par. 15,388 at pp. 20,565-66 (1972). We believe that the Judge reasonably weighed this as well as other statutory criteria in arriving at the penalty assessments. The Board will not disturb his findings in the absence of compelling evidence to the contrary.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that: the decision of the Administrative Law Judge IS AFFIRMED; and, Spring Branch Coal Company pay \$3,000 on or before 30 days from the date of this decision.

C. E. ROGERS, Jr., *Chairman.*

DAVID DOANE, *Member.*

NAVAJO TRIBE OF INDIANS

v.

STATE OF UTAH

12 IBLA 1

Decided June 29, 1973

Appeal from decision of Director, Bureau of Land Management, dismissing

a protest against issuance of confirmatory patent to the State of Utah for two sections of land.

Affirmed as modified.

Patents of Public Lands: Generally—
School Lands: Generally—Secretary of the Interior—State Grants

Where the Secretary of the Interior is required by the Act of June 21, 1934, upon application by a state, to issue a patent to the state for school lands and to show the date title vested and the extent to which the lands are subject to prior conditions, limitations, easements, or rights, if any, he (and his delegates) may determine questions of law as well as fact, including a determination as to whether title passed under the school land grant.

Act of July 16, 1894 (Utah Enabling Act)—School Lands: Grants of Land—State Grants

Title to school sections granted to the State of Utah by section 6 of the Utah Enabling Act, 28 Stat. 109, vests in the State on the date of Statehood (January 4, 1896), or upon completion and acceptance of the survey of the sections if the lands were not then surveyed.

Administrative Practice—Administrative Procedure: Generally—Indian Lands: Generally—Rules of Practice: Evidence—School Lands: Generally

Although the Board of Land Appeals takes official notice of the findings and conclusions in an interlocutory order of the Indian Claims Commission on the claim of the Navajo Tribe of Indians against the United States, the Board's decision on a protest by the Tribe against issuance of a confirmatory patent to the State of Utah for school land sections now included within the boundaries of the Tribe's reservation is based solely upon the evidence in the hearing in the

June 29, 1973

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ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that: the decision of the Administrative Law Judge IS AFFIRMED; and, Spring Branch Coal Company pay \$3,000 on or before 30 days from the date of this decision.

C. E. ROGERS, Jr., *Chairman.*

DAVID DOANE, *Member.*

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Department on this protest and upon its own application of the law to the facts in this case.

Indian Allotments on Public Domain: Generally—Indian Lands: Generally

The Indian Homestead and General Allotment Acts manifested a general governmental policy prior to and for some time after 1900 to replace the Indian reservation and communal tribal system, to encourage individual Indians to own their own small farm lands, and to open surplus reservation lands to disposition under the public land laws.

Grazing and Grazing Lands—Taylor Grazing Act: Generally

Prior to the Taylor Grazing Act of June 28, 1934, generally open, unreserved public lands could be grazed upon without federal governmental interference or regulation, but subject to certain state laws.

Indian Allotments on Public Domain: Generally—Public Lands: Generally— Settlements on Public Lands—Taylor Grazing Act: Generally

From the latter part of the 19th century to the Taylor Grazing Act of June 28, 1934, there was a general policy of the federal government to permit acquisition of title to open, unreserved public lands by individuals settling upon the land, including Indians, but vested rights were obtained to the lands only upon compliance with a specific act of Congress, and only for the maximum acreage allowable under that law.

Administrative Procedure: Hearings— Rules of Practice: Evidence

Exhibits and oral testimony in an administrative hearing are not fungibles where evidentiary value is ascribed on a quantum basis. Instead, they are products having different probative values dependent upon factors such as relevance, competency and credibility.

Indian Lands: Aboriginal Title— Indian Lands: Tribal Lands

The Treaty of 1868 between the Navajo Tribe of Indians and the United States whereby the Tribe relinquished its claim to land outside the boundaries of a reservation provided thereby, extinguished the aboriginal occupancy rights of the Tribe and its members to any land outside that reservation.

Indian Allotments on Public Domain: Settlement

Under section 4 of the General Allotment Act of 1887, no improvements or other acts of settlement are required for allotments for minor children of a qualified adult allottee who has maintained settlement on his own allotment.

Indian Tribes: Generally—Rules of Practice: Appeals: Standing to Ap- peal—Rules of Practice: Private Contests—Rules of Practice: Pro- tests—School Lands: Generally

The Navajo Tribe of Indians has standing within the Department of the Interior to contest or protest against the issuance of a confirmatory patent to the State of Utah for school sections within the exterior boundary of the reservation for the Tribe.

Indians: Generally—Statutory Con- struction: Generally

There is a well-established rule of statutory construction to favor Indians in case of doubt as to the meaning of words in treaties or legislation in their behalf; however, the rule is not inflexible in its application and must give way where such action is warranted by other rules of construction and the circumstances of the case.

Act of July 16, 1894 (Utah Enabling Act)—Indian Lands: Generally— School Lands: Generally—School Lands: Particular States—State

June 29, 1973

Grants—Statutory Construction: Generally

To determine whether any Indian occupancy by Navajos outside their recognized reservation boundaries was recognized by the Utah Enabling Act of 1894 so as to prevent the operation of the grant of lands for school purposes to the State, the intent of Congress must be ascertained by reading the provisions of the grant and the disclaimer of lands "owned or held by any Indian or Indian tribes" together, by considering the usual meaning of the words, by determining the overall purpose of the Act, and by considering the provisions in accordance with the historical milieu and public policy of that time, as well as any court interpretations of other statutes.

Statutory Construction: Generally—Words and Phrases

The word "held" as used in statutes in relation to land often means "owned," but as there is no fixed primary or technical meaning, its meaning must be determined by the context in which it is used to ascertain the legislative intent.

Act of May 17, 1884 (Alaska Organic Act)—Act of July 16, 1894 (Utah Enabling Act)—Alaska: Indian and Native Affairs—Indians: Generally—Statutory Construction: Generally

Historical differences between the situation in Alaska and the other states afford reasons for different interpretations of legislation pertaining to Alaska natives and legislation pertaining to Indians in the other states. Therefore, section 8 of the Act of May 17, 1884, regarding the occupancy of Alaska natives and others upon public land, is not *in pari materia* with the disclaimer provision in section 3 of the Utah Enabling Act of 1894, as to lands "owned or held by any Indian or Indian Tribes."

Indian Lands: Aboriginal Title

The standard used to determine the extent of an Indian tribe's aboriginal occupancy is whether the tribe occupied a defined area to the exclusion of other tribes.

Indian Lands: Aboriginal Title—School Lands: Grants of Land—State Grants—Withdrawals and Reservations: Effect of

Where Indian aboriginal rights are terminated by abandonment or relinquishment by a treaty with the United States, a state may take a grant of lands unencumbered by any occupancy claims in the Indians, and where the state's title has vested, subsequent action by Congress setting the lands apart as a reservation for the Indians cannot affect the state's title. However, if a reservation has been created prior to the grant, the state's title cannot vest until the reservation is extinguished.

Indian Allotments of Public Domain: Generally—Settlements on Public Lands—School Lands: Generally

Although the school land grant to the State of Utah was subject to existing inchoate settlement claims, including any by individual Indians outside their reservation, if the claims were not perfected, the State's title to the lands vested.

Homesteads (Ordinary): Generally—Indian Allotments on Public Domain: Generally—Settlements on Public Lands—Statutory Construction: Generally

The Indian Homestead Acts and section 4 of the General Allotment Act are settlement acts within the framework of other settlement laws pertaining to the public lands, and the practice, rules and decisions regarding white settlers on the pub-

lic lands have been applied to them with certain reasonable modifications taking into account Indian habits, character, and disposition.

Indian Lands: Generally—Indian Lands: Tribal Lands—School Lands: Generally—School Lands: Particular States

The Acts of March 1, 1933, adding "vacant, unreserved, and undisposed of" public lands to the Navajo reservation, and of September 2, 1958, declaring lands within the exterior boundaries of the Navajo reservation in trust for the Navajo Tribe, "subject to valid existing rights," did not affect the existing title of the State of Utah in school sections which had vested in the State in 1900 when surveys were approved including the sections.

Act of July 16, 1894 (Utah Enabling Act)—Indian Lands: Generally—School Lands: Generally—School Lands: Particular States—Statutory Construction: Generally

By the Utah Enabling Act of 1894, Congress did not intend the grant of school lands to the State of Utah, effective upon survey in 1900, to be held in abeyance as to unreserved public lands which may have been within a wide, undefined perimeter of use by a proportionately few Navajo families outside their reservation grazing flocks of sheep with transitory encampments in an area also used by non-Indians for grazing purposes and wandered over by Indians from other tribes.

Federal Employees and Officers: Authority to Bind Government—Indian Lands: Generally—School Lands: Generally

Where lands were not withdrawn for Indians, any express or implied consent by Indian Office officials to Navajos grazing sheep on public lands outside their reservation boundaries where no claim to the land was made under section 4 of the

General Allotment Act and the lands were recognized by such officials and other government officials as public lands, rather than Indian lands, could not create Indian tribal occupancy rights to such lands superior to the Congressional grant to the State of Utah for school lands, and the State took an unencumbered fee simple title to such sections.

APPEARANCES ON APPEAL: Bruce E. Babbitt, Esq., Brown, Vlassis & Bain, Phoenix, Arizona; John H. Schuelke, Esq., Gallup, New Mexico; for the Navajo Tribe. Vernon B. Romney, Esq., Attorney General, State of Utah; Gerald R. Miller, Esq.; Denis R. Morrill, Esq.; Special Counsel, for the State of Utah.

*OPINION BY
MRS. THOMPSON
INTERIOR BOARD OF LAND
APPEALS*

The appeal in this case is the culmination of extensive proceedings within this Department arising from an application filed by the State of Utah (hereafter referred to as the "State") on June 10, 1958, for a confirmatory patent to two school sections lying within the exterior boundaries of the extension of the Navajo Reservation added by the Act of March 1, 1933, 47 Stat. 1418 (hereafter called the Aneth or the 1933 extension). The Navajo Tribe of Indians (hereafter referred to as the "Tribe") protested against the issuance of the patent to the State. Its protest was dismissed by the Salt Lake Land Office, and that dismissal was affirmed by the Acting Director, Bureau of Land Management, on September 23,

June 29, 1973

1960. The Bureau's dismissal was set aside by decision of the Solicitor, 72 I.D. 361 (1965), who remanded the case for a hearing on the Tribe's protest. The hearing was presided over by Administrative Law Judge John R. Rampton, Jr.¹ and sessions were held in Cortez and Fort Morgan, Colorado, and Monticello and Salt Lake City, Utah.² A recommended decision by Judge Rampton was adopted with only minor changes by decision of the Director, Bureau of Land Management, dated August 15, 1969, which dismissed the Tribe's protest and ordered issuance of the confirmatory patents to the State for the two sections in question. The Tribe has appealed from this decision.

Pursuant to a motion of the Tribe and order of this Board, oral argument by counsel of the Tribe and the State³ was heard by this panel on April 21, 1972.

The State's application for patent was made under the Act of June 21, 1934, 43 U.S.C. § 871a (1970), which directs the Secretary of the Interior, upon application by a state, to issue patents to numbered school sections

in place showing "the date when title vested in the State and the extent to which the lands are subject to prior conditions, limitations, easements, or rights, if any."

Where this Department has a statutory duty to issue a patent or other evidence of title to a claimant, including a state, there is authority to determine questions of law as well as fact incident to performance of that duty. *West v. Standard Oil Co.*, 278 U.S. 200, 220 (1928). This includes a determination as to whether title passed under the grant to a state. *Margaret Scharf*, 57 I.D. 348 (1941). The Act of June 24, 1934, is not a new grant of title to a state. The issuance of the patent authorized by the Act is simply evidence of title which has already vested. *Id.*

The two sections in question are section 16, T. 40 S., R. 24 E., S.B.M., Utah (hereafter referred to as the Montezuma Creek section), and section 16, T. 40 S., R. 26 E., S.B.M., Utah (hereafter referred to as the McElmo Creek section). They are both in a remote desert area of southeastern Utah in San Juan County, north of the San Juan River. Official survey plats including these sections were accepted on May 1, 1900 (State Exhibits (Exs.) 23, 25; Navajo Tribe (Nav.) Ex. 61-0). The sections are numbered school sections granted to the State by section 6 of the Utah Enabling Act of July 16, 1894, 28 Stat. 109. Title to school sections would vest in the State upon the date of Statehood (January 4, 1896), or upon completion and acceptance of the survey of

¹ The title of the hearing officer has been changed from "Hearing Examiner" to "Administrative Law Judge" pursuant to order of the Secretary of the Interior, 38 F.R. 10939 (May 3, 1973).

² At the hearing the Tribe was represented by Norman L. Littel, Esq., Washington, D.C., then General Counsel of the Tribe, and John H. Schuelke, Esq. The State of Utah was represented by Phil L. Hansen, Esq., then Attorney General for the State of Utah (on the briefs only), Gerald R. Miller, Esq., and F. S. Prince, Esq., Special Counsel.

³ The oral argument in behalf of the Tribe was made by John H. Schuelke, Esq., and Bruce E. Babbitt, Esq., and in behalf of the State by Gerald R. Miller, Esq.

the sections if the lands were not then surveyed. 43 CFR 2623.1; *State of Utah, v. Braffet*, 49 L.D. 212 (1922). Thus, presumptively, title to the sections vested in the State on May 1, 1900, when the surveys were approved.⁴

The basic position of the Tribe is that title could not vest in the State on May 1, 1900, or thereafter, because the sections were occupied by individual Navajo Indians or by the Tribe in a tribal capacity and this

⁴We note that the Supreme Court held that the Utah school grant did not include lands which were known to be mineral in character when they were surveyed. *United States v. Sweet*, 245 U.S. 563 (1918). However, by the Act of January 25, 1927, as amended, 43 U.S.C. § 870 (1970), Congress extended the school grants of numbered sections in place to include such sections which were mineral in character unless indemnity or lieu land had been previously selected in lieu of the sections, and excepted sections subject to or included in any valid application, claim, or right initiated or held under any of the existing laws of the United States, unless or until such reservation, application, claim, or right is extinguished, relinquished, or canceled. This Act and the Act of June 21, 1934, are thoroughly discussed in *Margaret Scharf*, which points out that until the contrary is clearly shown, there is a very strong presumption that land granted to a state for school purposes was of the character contemplated by the grant, insofar as its then known mineral or nonmineral character was concerned. 57 I.D. 348, 356-57.

In this case there has been no assertion and no evidence which would clearly establish that the land in question here was known to be mineral in character in 1900 when the surveys were approved so as to effectuate any change in the date title presumptively passed to the State of Utah. There was testimony by a witness of the State, Neil F. Stull, that in the 1920's the lands in the area were not even considered as having prospective value for oil. As an employee of the Department of the Interior in the 1920's he investigated Indian allotments in the area to determine if the lands in the applications were mineral or nonmineral in character (Tr. 1122-30).

The fieldnotes of the 1900 survey of the two townships stated there were no indications of mineral within the township except "a vein of coal underlays the mesa along the N. bdy" of T. 40 S., R. 26 E. (State Exs. 23 and 25).

occupancy had the legal effect of precluding the grant of these two sections to the State. Throughout these proceedings the Tribe has offered various legal theories to support this basic thrust. These will be discussed further, *infra*.

The Solicitor ordered the hearing to receive "all the facts pertaining to occupancy which may be relevant." In reviewing the lengthy evidentiary record, we note that the Judge admitted most of the evidence offered by both parties at the hearing.⁵

Summary of Type of Evidence

The type of evidence submitted at the hearing is detailed in the Director's decision as follows:

[T]he Tribe presented testimony from numerous elderly Navajo Indians. These people, unlettered, unable to speak the English language and requiring interpreters, testified that they had lived on or near the school lands in question or that they had known of Navajo friends and relatives, now dead, who had lived on or near the sections involved. In support of the general proposition that, since before the beginning of recorded history, the Navajo people have resided and lived in the area known as the Aneth extension of the Navajo Reservation north of the San Juan River, the Navajo Tribe introduced voluminous exhibits which fall into five main categories, as follows:

1. Ancient documents from the National Archives, including maps dated from 1716, diaries and reports of early explorers, military reports, reports of Indian agents to the Commissioner of In-

⁵The hearing record is voluminous consisting of a transcript of 2,230 pages covering testimony of some 64 witnesses, with approximately 750 numbered exhibits containing thousands of separate documents.

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dian Affairs, Indian allotment papers and homestead papers.

2. Technical data such as survey plats, population surveys, aerial photos, and genealogy studies and charts.

3. Published reports and analyses by historians, ethnologists, and anthropologists.

4. Archaeological reports, site photos and descriptive sheets.

5. Portions of the transcript in the case of *Bill Hatahley et al. v. United States of America*, in the United States District Court for the District of Utah, Civil No. C-36-53 (Nav. Ex.'s 59-59A), and in the proceedings before the Indian Claims Commission, *Navajo Tribe of Indians et al., Petitioners v. U.S.A., Defendant*, Docket No. 229.

Foundation testimony for the archaeological reports was given by two anthropologists employed by the Navajo Tribe and by a member of the Navajo Tribe who has participated in the preparation of the site reports. Foundation testimony for the hospital records and the census reports was given by members of the Navajo Tribe and by officers of the Bureau of Indian Affairs.

In rebuttal, the State of Utah called as witnesses elderly members of the Ute Tribe of Indians who, like the elderly Navajos, were unable to speak English and required interpreters. These people and their ancestors had also lived and roamed throughout the Aneth extension area. Testimony was also given by elderly white men who had run stock in the area involved, by traders to the Indians, and by a retired employee of the Department of the Interior, a geologist who had examined the Indian allotments in Townships 39 and 40 South, San Juan County, Utah.

For a specific rebuttal of the methods used by the Navajo Tribe archaeologist in examining the numerous sites reported as Navajo and the reliability of the archaeological site reports, the State called as a witness an assistant research professor in anthropology at the University of Utah who, using material furnished to him by

the Navajo Tribe, resurveyed many of the sites written up in the Navajo reports.

Summary of Director's Findings and Conclusions

The Director's decision discusses in some length evidence concerning the general background and history of the Navajo people and their occupancy in the southwestern United States; general Navajo occupancy of the area added to the Navajo reservation by the 1933 extension; occupancy by individual Navajos with respect to each of the sections in question which lie within that extension; and other general historical information of that area. The decision then discusses the contentions of the Tribe in support of its protest against the patent to the State relating the law concerning the protection of Indian rights generally; individual Indian occupancy rights; aboriginal tribal rights of possession; the effect of the 1868 Treaty of the Tribe with the United States, 15 Stat. 667; the effect of the Utah Enabling Act; and the standing of the Tribe to protest the State's application.

Essentially, the Director found that there was no occupancy by individual Navajos upon the disputed sections until after May 1, 1900, that the area of occupancy judged with respect to the mode of life of the Navajo was vague and indeterminate, and that there was not exclusive occupancy by the Navajos nor was dominion over the area asserted by them. Further, it found there was not sufficient tribal

occupation of the area to establish tribal possession. In any event, it held that tribal claims to the land were barred by virtue of the 1868 Treaty of the Tribe with the United States. It held the Tribe did not have standing to protest the State's application, as any occupancy by individual Indians in 1900 sufficient to bar the State's grant would also be protected and prevent the Tribe's claim to the land under the Aneth extension Act of March 1, 1933, adding "vacant, unreserved, and undisposed of public lands," and the Act of September 2, 1958, 72 Stat. 1686, declaring lands within the exterior boundaries of the reservation subject to "valid existing rights" to be in trust for the Tribe.

Significant Geographical Features

The evidence in this case is related to certain geographical features. In 1900, the most significant date in this case, the northern boundary of the Navajo reservation in Utah and in New Mexico, was the San Juan River. That boundary was established by Executive Order of May 17, 1884. The San Juan River from its headwaters in southern Colorado runs through a portion of northeast New Mexico, then cuts across a small portion of Colorado near the Four Corners area of Utah-Arizona-Colorado-New Mexico. It then flows in double hairpin turns northwesterly then southwesterly then northwesterly and then southwesterly again until it reaches its mouth in the Colorado River in southern Utah. In addition to the

San Juan River the two main drainage courses within the 1933 extension are the McElmo and Montezuma Creeks which flow through the easterly and westerly portions of the 1933 extension area, respectively, southerly to their mouths in the San Juan River.⁶ Portions of those creeks flow through the subject sections which are identified by reference to them. North and west of the Montezuma section is an area called McCracken Mesa, mentioned as a favorite grazing range of the Navajos. This was added to the reservation by the Act of September 2, 1958 (72 Stat. 1686). Outside the reservation, in townships west of the 1933 extension and flowing from the north are Recapture Creek (its mouth in the San Juan River is in T. 22 E., R. 40 S.), and Cottonwood Creek (its mouth is in T. 21 E., R. 40 S.). Near the mouth of Cottonwood creek at the San Juan River is the Mormon settlement of Bluff founded in 1880 (Tr. 1779). Four townships north and one township east of Bluff is the town of Blanding first settled in 1905 (Tr. 1781). Three townships north and one township east of Blanding is the town of Monticello. West of Monticello is a mountain range called the Abajo or Blue Mountains. In the southern part of that range and southwest of Blanding is a moun-

⁶ The use of the word "flow" is to describe the bed of these creeks or washes. In this dry desert climate during dry spells often no water would actually flow through these creeks, while during spring runoffs and unusually heavy rains the torrents of water would cause some changes in the stream-flow configuration and flooding.

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tain called Bears Ears. Other significant water courses include Mancos Creek with its mouth in the San Juan in New Mexico very near the Four Corners. The rest of the creek is within the State of Colorado, most of it within the southern Ute Reservation. Chinle Creek or Wash meanders from northern Arizona to the San Juan River in Utah, a township west of Bluff.

The Tribe and the State in this appeal have referred to findings and conclusions by the Indian Claims Commission in a proceeding brought by the Tribe against the United States (Docket No. 229) under the Indian Claims Commission Act, 25 U.S.C. § 70 *et seq.* (1970). By its Interlocutory Order of June 29, 1970 (23 Ind. Cl. Comm. 244), the Commission found that on July 25, 1868, the Navajo Tribe held aboriginal title to a large tract of land which includes lands in Utah beginning at the intersection of the Colorado and San Juan Rivers "thence on a line northeasterly to Bears Ears; thence easterly to Blanding, Utah, thence southeasterly to Cortez, Colorado * * *," except for certain lands in Spanish or Mexican grants (Finding 17, 23 Ind. Cl. Comm. 272). The Commission also concluded as a matter of law that as of July 25, 1868, the effective date of the Navajo Treaty of July 1, 1868 (15 Stat. 667), the Tribe ceded its aboriginal title lands to the United States under the 1868 Treaty, except for the area specifically reserved to the Tribe under Article 2 of the Treaty. The Tribe

points out that the sections involved here are within the area found by the Commission to be aboriginal lands of the Tribe, whereas the State points to the Commission's conclusions that the Tribe ceded its aboriginal title to such lands by the 1868 Treaty.

For informational purposes, we have taken official notice of these findings and conclusions of the Commission and of its order for further proceedings to determine the acreage of the lands ceded by the Tribe, its fair market value as of July 25, 1868, and other matters relative to the determination of the extent of the liability of the United States to the Tribe. We note that the Commission's order is not a final order and is, therefore, not a final determination of the issues involved in that proceeding and will not become so until a final order is issued and any possible court appeals are concluded.

In addition to the fact the Commission's ruling is not a final determination, the State was not a party in that proceeding and, therefore, no factual findings in that case could bind the State. Our findings and conclusions in this controversy between the Tribe and the State rest solely upon our review of the evidence presented at the hearing in this case and such additional specific evidentiary matters as may be noted in this decision of which official notice has been taken, and upon our own understanding and application of the law to the facts shown.

Summary of Legal Theories

A brief review of the legal theories presented by the Tribe is necessary to set the discussion of the facts in proper perspective. The case went to hearing on the issues as they were formulated and briefly outlined in the Solicitor's decision at 72 I.D. 361 (1965) and as discussed by the Director in his decision. Essentially the Tribe contended as follows: Protection of occupancy rights in individual Indians, as well as Indian Tribes, is a matter of federal governmental policy and recognized in the Supreme Court decision, *Cramer v. United States*, 261 U.S. 219 (1923). Occupancy by individual Indians would be sufficient to prevent the grant of school sections to a State, citing *Schumacher v. State of Washington*, 33 L.D. 454 (1905). These occupancy rights by individual Indians were independent of and in addition to any rights of a Tribe to lands within reservations established for the Tribe. The policy of protecting occupancy rights of individual Indians is reflected in the Utah Enabling Act where in paragraph 2 of section 3 of that Act (28 Stat. 107, 108), the State disclaimed any claim to lands "owned or held by any Indian or Indian Tribes." The Tribe pointed out that the Supreme Court in *Cramer*, *supra*, referred to this disclaimer provision to support its position that the occupancy of individual Indians in that case prior to a grant to a railroad caused such lands to be within the provision in the grant ex-

cepting lands "reserved * * * or otherwise disposed of." The Tribe contended that by applying that holding here the school sections were excepted from Utah's grant by the provision in section 6 of the Enabling Act (28 Stat. 109) relating to lands "otherwise disposed of," as they were lands occupied by Navajo Indians prior to the school grant.

The Tribe further contended that in considering the occupancy by the individual Indians the standard is to view the Indian possession and use with reference to the habits and modes of life of the particular Indian involved. The Navajos principally grazed livestock, conducted small farming operations, and hunted and gathered other foods from wild sources for their livelihood. Therefore, the control of land by a Navajo was by the protection and care of his livestock comparable to the way a livestock man controls an area to protect his grazing even though he may not actually live on each acre.

The Tribe's original position was that such individual occupancy and control were translated into a tribal right by virtue of the inclusion of these sections in the area added to the reservation by the 1933 extension and by virtue of section 1(d) of the Act of September 2, 1958 (72 Stat. 1686, 1687), which provided that "all public lands of the United States within said exterior boundaries of said reservation are hereby declared to be held in trust for the benefit of the Navajo Tribe of Indians."

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The State, in response, contended that the type of occupancy by the Navajos was not the type protected in the *Cramer* and *Schumacher* decisions, *supra*, but if it were, it pointed out that the 1933 extension added only "vacant, unreserved, and undisposed of public lands" (47 Stat. 1418). Also, the 1958 Act provided that the declaration of trust for the Navajo Tribe was "subject to valid existing rights." (72 Stat. 1687.) It contended, therefore, that any occupancy of the school sections sufficient to preclude the grant to the State would also create rights in the individuals under the provisions sufficient to except the lands from those Acts. Thus, it argued, only such individual Indians, not the Tribe, would have standing to challenge the State's title.

The Director agreed with the State on the issue of standing, concluding that only individuals who allegedly occupied the sections in 1900 or their descendants might have standing to protest. Specifically, he stated that the Tribe was not bringing the action to protect any individual Indian occupant's own home from any oppressor, but instead was asserting such occupancy "for its own purposes as a means of defeating the State's title and thereby gaining valuable assets for the Tribe."

The Tribe originally also implied that there was tribal aboriginal occupancy of the area but did not emphasize this point. In the present appeal, the Tribe in its first brief

repeats its contentions concerning individual occupancy as precluding the vesting of the State's grant. In a supplemental brief and again in its reply to the State's brief in answer to that brief, the Tribe emphasizes an additional position to that expressed previously. The Tribe now contends that regardless of the effect of its Treaty of 1868, the Tribe has rights to these lands not based on its tribal aboriginal occupancy of the area but by virtue of the disclaimer in the Utah Enabling Act of any lands "owned or held by any Indian or Indian Tribes." In effect, it interprets this Act as preventing the grant to the State of lands "held" by tribal occupancy. As to the test of occupancy necessary to establish lands "held" by the Tribe, it suggests the standard be the area which was "essential to the livelihood" of the Indians as judged by the natural environment and lifestyle of the individual Indian or Indian tribe in question, with limitations as to whether the use and occupation is sufficiently intensive and continuous. It derives this suggested standard from its interpretation of cases primarily dealing with the Alaskan natives.

The State contends essentially that the Utah Enabling Act created no rights in the Tribe as to lands in Utah because tribal rights had been extinguished, but that assuming, *arguendo*, such rights existed, the evidence found by the trial examiner would not support the Tribe's claim under the tests laid down in cases cited by the Tribe.

Issues

This brief skeletal framework of the most basic contentions of the Tribe and State points to the most significant issues in this case, namely:

1. What was the effect of the 1868 Treaty of the Tribe with respect to tribal and individual Indian rights to the lands in question?

2. Were rights to these lands preserved or created in individual Indians or the Navajo Tribe by the Utah Enabling Act?

3. What was the effect of the 1933 and 1958 Acts upon the status of the sections?

4. Does the Navajo Tribe have standing to challenge the State's patent application?

5. If occupancy by Indians could prevent the State's title from vesting, what standard governs the adequacy of the occupancy?

6. Does the evidence in this case establish there was sufficient occupancy by individual Indians or the Navajo Tribe under the proper standard to preclude the grant to the State?

These essential issues will be discussed, *infra*, not necessarily separately or in the above order, as their resolution requires a consideration of the statutes involved and the facts concerning Navajo occupancy generally in the context of the historical setting as well as it can be adduced from the record. This entails a consideration of facts concerning other peoples in the area, the Mormon settlers and other whites (primarily stockmen, a few traders, missionaries and miners), and other Indian groups, especially the Utes and Paiutes (or as also spelled, Piutes). Inseparably intertwined with these facts as to the

history of the people in the area, is a consideration of the manifested governmental policy, as the Tribe's contentions in large part rest upon the effect of the Utah Enabling Act and upon the federal government policy to protect occupancy of Indians. See the discussion regarding statutory construction, *infra*.

Summary of General Indian and Related Public Land Law

The dates of the pertinent statutes, court and administrative decisions, and governmental administrative actions toward the Navajos, are important in relation to the historical milieu out of which they arose. Although a history of the Government's policies toward Indians generally would be of encyclopedic breadth and beyond the scope of this decision, highlights of some of the general policies shall be briefly noted as they are part of this milieu. It must suffice to state that prior to the creation of this nation, the European nations claimed title to the lands now in these United States by right of "discovery" under basic principles of international law, but subject to occupancy rights of the aboriginal inhabitants, the Indians. See U.S. DEPT OF THE INTERIOR, FEDERAL INDIAN LAW 18 (1958). This served as the foundation for this Government's recognition of Indians' rights of occupancy. One of the landmark cases, *Mitchel v. United States*, 11 U.S. (9 Pet.) 539, 559 (1835), discussing the aboriginal occupancy rights of Indian tribes

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and the policies by the English sovereign which were carried over by this nation, indicated the nature of those rights:

* * * friendly Indians were protected in the possession of the lands they occupied, and were considered as owning them by a perpetual right of possession in the tribe or nation inhabiting them, as their common property, from generation to generation, not as the right of the individuals located on particular spots.

Subject to this right of possession, the ultimate fee was in the crown and its grantees, which could be granted by the Crown or colonial legislatures while the lands remained in possession of the Indians, though possession could not be taken without their consent.

The Supreme Court in *Mitchel* set forth the standard for recognizing tribal aboriginal rights and the conditions which would cause nonrecognition:

Indian possession or occupation was considered with reference to their habits and modes of life; their hunting-grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its conclusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals. In either case their right became extinct, the lands could be granted disincumbered of the right of occupancy, or enjoyed in full dominion by the purchasers from the Indians. * * * *Id.*

This recognition of a communal or tribal aboriginal occupancy right led to various provisions in treaties and statutes for individual Indian rights in tribal property. See U.S. DEPT OF THE INTERIOR, FEDERAL INDIAN LAW, Ch.

IX, Pts. B, C (1958). In addition to specific provisions for rights in recognized tribal lands, general legislation in the 1870's and 1880's permitted individual Indians to acquire property rights outside Indian reservations.

By the Act of March 3, 1875, 43 U.S.C. § 189 (1970), an Indian who abandoned his tribal relations was permitted to make a homestead under the homestead laws, which was to be inalienable for five years. By the Indian Homestead Act of July 4, 1884, 43 U.S.C. § 190 (1970), any Indian who was located on public lands at that date or thereafter "under the direction of the Secretary of the Interior, or otherwise," could locate homesteads on public lands to the same extent as citizens of the United States, but would receive trust patents—to prevent alienation of the property as a means of protecting his interests. By section 4 of the General Allotment Act of February 8, 1887, 25 U.S.C. §§ 334 and 336 (1970), allotments to individual Indians who settled on public lands outside of reservations, or for whose tribe no reservation had been made, and their children, could be made to the extent of 40 acres of irrigable land, or 80 acres of nonirrigable agricultural land, or 160 acres of nonirrigable grazing land to any one Indian. Section 1 of that Act, 25 U.S.C. § 331 (1970), provided for allotments of reservation lands to individual Indians. These Acts have been recognized as manifesting the overall Governmental policy that prevailed at that

time, and for some time after 1900, to replace the reservation and communal tribal system, to end Indians' nomadic lifestyle, to encourage individual Indians to integrate into the cultural structure of the rest of the nation by owning a parcel of land to farm and to take their place as independent, qualified members of the body politic, and to open surplus reservation lands for disposal under the public land laws. See *e.g.*, **FEDERAL INDIAN LAW**, Ch. IX, Pt. C, *supra*; F. S. COHEN, **U.S. DEPT OF THE INTERIOR, HANDBOOK OF FEDERAL INDIAN LAW**, Chs. 2, 11 (1941); *Squire v. Capoeman*, 351 U.S. 1 (1956); *Hopkins v. United States*, 414 F.2d 464 (9th Cir. 1969).

This policy to transform the communal Indian property system into a pattern of small individually owned farms was during the time the unreserved federal public lands could be settled upon and title acquired by individuals under laws such as the preemption acts and the homestead laws, usually for a maximum of 160 acres (see, *e.g.*, 43 U.S.C. § 161 (1970)). Certain improvements, acts of occupancy, application and proofs were required before a vested right could be recognized in the settlers. Desert lands could be reclaimed and title acquired under the Act of March 3, 1877, 19 Stat. 377, for 640 acres; however, by the Act of August 30, 1890, 26 Stat. 371, 391, 43 U.S.C. § 212 (1970), the aggregate quantity which any person could acquire under all the agricultural land laws,

including the Desert Land Act, *as amended*, 43 U.S.C. § 321 (1970), was limited to 320 acres.

The Desert Land Act and, to a greater degree, later acts required a classification of the land by the Government as to the character contemplated by the Acts prior to allowance of entries. Thus, in 1909, the Enlarged Homestead Act, 43 U.S.C. § 218 (1970), was passed authorizing 320-acre homesteads on nonirrigable, nonmineral land for dry-farming, in Utah and certain other western states. In 1916, the Stock Raising Homestead Act, 43 U.S.C. §§ 291-301 (1970), authorized 640-acre homesteads for land that was "chiefly valuable for grazing and raising forage crops."

It was not, however, until the Taylor Grazing Act of June 28, 1934, 43 U.S.C. § 315 (1970), that the unreserved federal public lands were regulated by the federal government for grazing purposes. Prior to that time, generally open, unreserved public lands could be grazed upon without federal interference or regulation. This historical practice of a free and open range is illustrated in a Supreme Court case arising from the then Territory of Utah. *Buford v. Houtz*, 133 U.S. 320 (1890). Operators of a cattle ranch whose private lands intermingled with federal public lands sought to enjoin sheep grazers from trespassing upon their unfenced private lands while grazing upon the public lands. The Court described the right to the public lands as follows:

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We are of opinion that there is an implied license growing out of the custom of nearly a hundred years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them where they are left open and unenclosed, and no act of government forbids this use. * * * *Id.* at 326.

* * * * *

* * * Everybody used the open unenclosed country, which produced nutritious grasses, as a public common on which their horses, cattle, hogs and sheep could run and graze. *Id.* at 327-28.

The Court pointed out that unless an owner of land complied with the "fence" law of the various states and territories, and an animal "breached" the enclosure and inflicted injury, the owner of the animal was not liable to the landowner, and could permit his animals to run at large without responsibility for their getting upon the lands of his neighbors. *Id.* The Court also indicated that the Territory of Utah had such a fence statute. See also *Omaechevarria v. Idaho*, 246 U.S. 343 (1918), recognizing certain regulation by states in exercise of their police power to avoid conflicts over the range. The Court held a state statute did not conflict with the Act of February 25, 1885, 43 U.S.C. §§ 1061-1066 (1970). The 1885 Act forbade enclosures of public land by a person, party, association, or corporation who had no claim or color of title in good faith, or a claim made in good faith under the general laws of the United States with a view to entry. It also

prohibited anyone from preventing or obstructing a settlement made under the public land laws.

This summary discussion of some of the general laws illustrates that during much of the time period in question here, especially from the time of the 1868 Treaty until the Taylor Grazing Act in 1934, there was a general policy of the federal government to encourage settlement upon the unreserved public lands and acquisition of title by individuals, including Indians. However, there were limitations as to the acreage which could be acquired by any individual under the laws and compliance with the laws was necessary before a right would vest to the lands. See cases cited, *infra*. At the same time, the public lands were considered an open range which could be grazed upon without regulation by the government. Inevitably, as is well known, conflicts over the use of this public land developed between settlers and stockmen, between cattle ranchers and sheep grazers, between the Indians and non-Indians, and also between different Indian tribes. The evidence in this case tends to show aspects of all of these conflicts.

The Evidence Generally

We now turn from these general considerations to the more specific circumstances of this case.

In its first brief presented in connection with this appeal, the Tribe contends that the Director completely ignored or refused to consider the hundreds of exhibits ad-

mitted at the hearing and the testimony of some fifty persons. It contends such evidence definitely establishes that the extension area and other areas north of the San Juan River in Utah were under Navajo Indian control, and that Navajo Indians lived in that area and also on the particular sections in question. It submitted a 205 page "Summary of Evidence," which the State points out is not directed to any specific error on the part of the Director, and which it characterizes as "an historical diatribe" presumably prepared by one of the Tribe's witnesses, David M. Brugge, employed by the Tribe as an archaeologist. It is apparent that this "Summary of Evidence" is based primarily on documentary materials reproduced by the Tribe as Navajo Exhibits Nos. 100 to 633 and to a much lesser extent upon the oral testimony of Navajo witnesses and other evidence presented by the Tribe.

We find no merit to the Tribe's contention that in making the decision below, the exhibits and testimony were not considered. The Director generally summarized the types of evidence presented. In discussing the facts he referred to some exhibits and to some of the testimony. Omissions of reference to particular exhibits or testimony in this case do not signify a failure to consider them.

Exhibits and oral testimony in an administrative hearing are not fungibles where evidentiary value is ascribed on a quantum basis. In-

stead, they are products having different probative values dependent upon factors such as relevance, competency, and credibility.

The difficulty in constructing a history of the area based upon the archival exhibits submitted by the Tribe was pointed out by the State's witness, Dr. C. Gregory Crampton, a professor of history at the University of Utah. He stated that only a partial history of general movement into the general area could be made and he did not recall documents that pinpoint any Indian activity to the contested sections (Tr. 2199-2201). We find, from reviewing the exhibits presented, at most only a vague and general picture primarily of United States governmental activities and policies relating to the Navajos.

The archival materials generally show increasing discontent by the Navajos with their reservation boundaries as the increase in their population, as well as of their herds of sheep, goats, and horses (and infrequently some cattle as well), created problems for them. Recommendations to increase the reservation boundaries reflect the need for additional grazing lands to support the major base of their economy, sheep grazing, and to remove sources of conflict with whites who objected to Indians leaving their reservation to graze their stock. Many of the complaints by whites made to military and Indian Office officials concerning Navajos outside the reservation relate to their grazing on public lands also grazed

upon by white stockmen. Other complaints relate to alleged depredations from murder, to petty theft, to ranging their stock through farm lands of the whites.

Although many of the exhibits refer to movement of the Navajos north of the San Juan River, only a few of these exhibits may be specifically related to the area north of the river in Utah. Much of the material referring to Navajos north of the San Juan appears to pertain to the more populous area in New Mexico, especially prior to 1900. Thus, this material is not relevant to the situation in Utah, except to show a pattern of expansion by Navajos from areas where they were confined following the 1868 Treaty, and to show federal administrative policies toward them.

Many of the documents are incomplete by themselves as they refer to other documents or to enclosures which are not a part of this record. While much that is stated in the Tribe's summary of evidence reflects matters shown by the exhibits there is also reference to some exhibits which were withdrawn and are not a part of the record, and many inferences stated in the summary are simply not supported by the exhibits and other evidence in the record.

Pre-1868 Indian Occupancy of the Area

The first time period of significance in this case concerns the period prior to the 1868 Treaty with the Tribe, when a permanent reserva-

tion for the Navajo people was created. For our purposes, this reservation may generally be described as rectangular in shape, with a northern boundary on the line between what is now the states of Utah and Colorado and Arizona and New Mexico in the Four Corners area. The western boundary was a parallel of longitude about 109° 30' west, provided it embraced the outlet of "Canon-de-Chilly" (15 Stat. 668). The northern boundary remained unchanged until the Executive Order of May 17, 1884, established it as the San Juan River. As indicated, the San Juan River was the northern boundary in Utah in 1900, the most crucial date in this case.

Information concerning the peoples who have inhabited the general Four Corners area begins with the prehistoric Anasazis. They are of interest in this case because of their ruins and artifacts. Around 1300 A.D., the Anasazis (ancestors of some of the Pueblo Indians) left the area and ancestors of the present-day Utes and Paiutes moved into the area. The Navajos, an Athapaskan linguistic group, moved from the north into the southwestern part of the United States sometimes around 1200 to 1500 A.D. Historical information concerning the Navajos in the southwestern states begins in the 17th century A.D. where mention is made of them at the headwaters of the San Juan River in Colorado (Tr. 2179).

Until 1848, the southwestern area with which we are concerned was

Spanish and then Mexican territory. Copies of some ancient maps and documents of Spanish and Mexican derivation were presented as exhibits. An historical expert, witness for the State, praised the historical accuracy of the Miera Map of 1778 of the Dominques-Escalante expedition (State Ex. 39) as showing the Navajos south of the Rio de Navajos, identified as the San Juan River (Tr. 2190-94), and the Utes located north of the river. He indicated that another map (Nav. Ex. 100) could not be accepted as accurate without more source data to support it (Tr. 2193-96). Another map, the Urretuia Map of 1769 (Nav. Ex. 105), had no supporting explanatory foundation support and is susceptible to some interpretation, but it has the word "Navajo" written below the river and "Provincia de" above the river. The witness identified the Chuska Mountain area of Arizona and New Mexico as the heartland region of the Navajos (Tr. 2179).

The United States acquired the Mexican territory in 1848 by the Treaty of Guadalupe Hidalgo, 9 Stat. 922. The Director summarized some of the events following that acquisition, which led to the 1868 Navajo Treaty:

* * * difficulties arose between the Navajo and the white settlers and resulted in several military operations which consummated in the Kit Carson campaign of the 1860's (Tr. 2179). It was Carson's objective to remove the Navajos from the area. This he partly accomplished in 1864 when perhaps half of the Navajos were marched to Fort Sumner in New Mexico and were there confined. Some of the Navajos escaped this fate

and moved into hiding in remote areas such as the canyon country near Navajo Mountain. The Fort Sumner confinement and military campaigns very probably account for much of the initial movement of the Navajos north toward the San Juan River (Tr. 2180).

Most of the archival material dealing with the Four Corners area and Navajo "country" after the United States acquired it is found in military reports and in reports of Indian Agents and the Indian Office. The Gunnison map of 1855 (Nav. Ex. 125) shows the Navajos as north of the San Juan River. The word "Navajo" is written between the $110^{\circ}30'$ to $109^{\circ}30'$, parallels of longitude, which area is west of the Aneth area. Other material prior to 1868 could only inferentially, at best, place the Navajos in the Aneth area, and does not show exclusive occupancy by the Navajos. For example, a letter of May 1, 1851, from the New Mexico Agent Calhoun (Nav. Ex. 116), states that the Navajos have or are removing from "Chinle" to the Rio San Juan and pitching their lodges on both sides of the river, and indicating that on the north side of the river, they must mix with the Utahs (Utes). Navajo Ex. 127, a War Department report of November 23, 1858, states that the Utahs killed 10 Navajos on the San Juan north of Carrissa Mountain.

In other reports it is not evident that the area north of the San Juan River pertained to the area in New Mexico and Colorado or Utah. For example, a report of May 7, 1852 (Nav. Ex. 120), indicated that the

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Navajos were moving north to the San Juan because they were afraid of Apaches. Likewise, a report of July 21, 1853 (Nav. Ex. 121), stated that Navajo criminals had gone north of the San Juan where there were many disaffected Utahs. Further reports of "thieves" or "bad" Navajos being north of the San Juan are found in Nav. Ex. 130. That some Navajos from the San Juan area surrendered to the military to go to Fort Sumner following Kit Carson's campaign is reflected in Nav. Exs. 134 and 135.

There was evidence that some Navajos may have hidden in the southeastern part of Utah and southwestern part of Colorado during Kit Carson's campaign and never went to Fort Sumner. There is insufficient evidence in the entire record, including the testimony of witnesses and archaeological site reports, however, to establish specific occupancy by such Indians and their descendants on these particular sections of land at that time and prior to 1900.

The Director found generally that the facts did not establish sufficient tribal possession of the area to establish occupancy of the area in question. He concluded that prior to the 1920's the area was a "no man's land" used and shared by white stockmen and traders, a few bands of renegade Utes fleeing from confinement of their Colorado reservation, and some Navajo families seeking pasturage for their livestock. However, in addition to this finding, he ruled, in effect, that if

there had been aboriginal occupancy by the Tribe prior to 1868, the Tribe relinquished all right to occupy the territory outside the reservation by the 1868 Treaty.

Effect of 1868 Navajo Treaty

The Tribe makes no argument concerning the effect of the 1868 Treaty upon its aboriginal tribal rights. It had previously alleged that it did not matter whether the occupancy was considered as being in the individual Indians or as tribal occupancy. The Tribe's most recent theory repudiates any significance to the Treaty because it asserts other tribal rights derived from the Utah Enabling Act and governmental policy apart from its aboriginal rights.

Nevertheless, the effect of the Utah Enabling Act and of governmental policy must be considered in relation to the Treaty. The Director's decision quotes from portions of the Treaty. We need only reemphasize that by Article IX of the Treaty, the Tribe, through its representatives, expressly relinquished all right to occupy any territory outside of the designated reservation area, except for retaining the right to hunt on any unoccupied lands contiguous to their reservation (15 Stat. 669, 670). By Article XIII, the Tribal representatives agreed to make the "reservation their permanent home, and they will not as a tribe make any permanent settlement elsewhere, reserving the right to hunt on the lands adjoining the said reservation

formerly called theirs." The Tribal representatives also agreed to do all they could to induce Indians away from the reservation, "leading a nomadic life, or engaged in war," to abandon such life and settle permanently in a reservation. It was agreed that if any Indian left the reservation to settle elsewhere he would forfeit all rights, privileges and annuities conferred by the terms of the treaty (15 Stat. 671).

The creation of the reservation following a military campaign and enforced confinement of the Tribe at Fort Sumner was in furtherance of the governmental policy at that time to keep the Navajos from engaging in depredations against non-Indians and other Indian groups. Non-Indians were not thereafter to be allowed within the established reservation boundaries without authorization from government officials (Art. II, 15 Stat. 668). By this segregation it was hoped that peace between the Indians and non-Indians could be maintained. The latter were increasingly moving into the southwestern part of the country following its acquisition from Mexico. For a discussion of the exclusive governmental rights retained by the Navajo Tribe over the lands within the Treaty reservation see *Arizona ex rel. Merrill v. Turtle*, 413 F. 2d 683 (9th Cir. 1969), *cert. den.*, 396 U.S. 1003 (1970), and cases cited therein.

It has long been established that Indian tribal aboriginal occupancy rights are extinguished by cession to the United States. *Mitchel v. United*

States, supra. The extinguishment of tribal aboriginal rights to lands outside of established reservations has been recognized in more recent times. *United States v. Santa Fe Pacific Ry. Co.*, 314 U.S. 339 (1941). A special three-judge Federal District Court of Arizona in a controversy between the Hopi and Navajo Indians as to lands within an executive order reservation created December 16, 1882, for the Hopi "and such other Indians as the Secretary of the Interior may see fit to settle thereon," specifically discussed the Navajo Treaty of 1868. The court indicated that the Navajos had no rights to lands outside the original reservation except insofar as the Government released them from their agreement when provision was made for them to occupy other lands by an executive order or other administrative order or by a statute. *Healing v. Jones*, 210 F. Supp. 125, 140 (D. Ariz. 1962), *aff'd, per curiam, Jones v. Healing*, 373 U.S. 758 (1963). The Supreme Court of Utah in *Young v. Felornia*, 121 Utah 646, 244 P.2d 862 (1952), *cert. denied*, 344 U.S. 886 (1952), also held that the 1868 Treaty bound the entire Navajo tribe and divested each member of aboriginal interests to lands outside the reservation.⁷

⁷ The action was brought by holders of grazing permits for public lands issued by the Bureau of Land Management, and also of grazing leases from the State of Utah as to school section lands to remove certain Indians from lands in San Juan County, Utah. The Utah Court upheld a summary judgment for the plaintiff although the Indians claimed exclusive grazing and possessory rights based upon their continuous use and occupancy of the land from time immemorial and their allegations that they were a separate band dis-

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If there was any doubt that *Healing v. Jones*, *supra*, differed in any respect from the view expressed by the Utah Supreme Court in *Young v. Felornia*, as to the effect of the 1868 Treaty upon the aboriginal rights of Navajo Indians, that doubt has been removed by a subsequent decision, *United States v. Kabinto*, 456 F.2d 1087 (9th Cir. 1972), *cert. denied*, 409 U.S. 842 (1972). In *Kabinto*, the United States sought to eject 16 Navajo Indians within a portion of the Hopi reservation which the Court in *Healing* ruled belonged exclusively to the Hopi Tribe. The Navajos claimed the *Healing* decision did not bind them for a number of reasons, including an assertion that they had aboriginal occupancy rights to the land based upon occu-

pancy which arose prior to the 1882 Executive Order establishing the Hopi Reservation. *Kabinto* held, however, that *Healing* was res judicata of the question of the extinguishment of their aboriginal claims. The court quoted, at 1090, from an unreported conclusion of law in *Healing* whereby the special court determined:

"Neither the Navajo Indian Tribe nor any individual Navajo Indians, whether or not living in the [Hopi] reservation area in 1882, gained any immediate rights of use and occupancy therein by reason of the issuance of the Executive Order of December 16, 1882, or by reason of any other fact or circumstance, save and except by the exercise, after December 16, 1882, of the authority reserved in the Secretary of the Interior, under the Executive Order of December 16, 1882, to settle other Indians in that reservation."

tinct from the Navajo Indians who signed the Treaty. The Court found from their admissions that they were Navajos whose ancestors were connectd with the Treaty Indians.

A similar action was brought by the United States to remove the Indians from the land. The United States Court of Appeals for the 10th Circuit overturned a District Court's dismissal of the suit on the ground factual questions had been raised by the Indians' claimed occupancy rights and their claims that they were a separate band of Indians not part of the Navajo Tribe and had no treaty obligations. *United States v. Hosteen Tse-Kest*, 191 F.2d 518 (10th Cir. 1951). It ruled that if the Indians were found to be willful and continuous trespassers they should be enjoined and remanded the case for trial. The action was later dismissed by the District Court on June 27, 1953, however, as being moot since the Indians had moved to the reservation.

These two cases are noted by the Supreme Court in *Hatahley v. United States*, 351 U.S. 173, 175 (1956), which the Tribe has cited as showing a recognition of the long-time occupancy of Navajo Indians in San Juan County. (Portions of the transcript in the *Hatahley* case were admitted as evidence in the present case, as Nav. Ex. 59.) The Indians in these three cases were occupying the McCracken Mesa area which was later

added to the Navajo Reservation by the 1958 act in an exchange for reservation lands in Arizona to be used by the United States in connection with the Glen Canyon Dam. The Supreme Court stated at 174 that Indians had lived "from time immemorial in stone and timber hogans on public land in San Juan County." The question presented before the Court was not one of title to the land, but whether the Indians could recover under the Federal Tort Claims Act, 28 U.S.C. §§ 2671 *et seq.* (1970) for the wrongful destruction of their horses by government employees. The Court held that the individual Indians were entitled to damages since the employees had not given them the requisite notice prescribed by the regulations issued pursuant to the Taylor Grazing Act of 1934, as amended, 43 U.S.C. § 315 (1970), before destroying the horses. The Court also held that the District Court could not enjoin the United States or its agents from interfering with the Indians. The case, therefore, does not stand as precedent for a recognition of occupancy rights in those Indians superior to the United States' grazing lessees, but, rather, that the Indians' right to have proper notice given before the destruction of their horses was equated with the same right in white men who graze without authorization on public range lands licensed to others.

The *Kabinto* decision emphasized the power of the United States to extinguish Indian title—the aboriginal right of occupancy. From the quotation above it concluded that *Healing* had considered the aboriginal claims of the Navajos and decided adversely to them. With reference to a contention that *Healing* had not discussed *Cramer v. United States*, which the Tribe relies on in this case, the Court stated at 1090:

* * * In *Cramer*, the Supreme Court held that Indians who settle upon the public domain and establish residency thereby acquire rights of possession. *Cramer*, as was *United States v. Santa Fe Pacific R. Co.*, *supra*, was an action brought by the United States to protect Indian title against third parties who also claimed interests from the United States. The question was not the power of the government to extinguish aboriginal Indian title, but whether that power was exercised. *Healing* determined that it had been.

Therefore, it is clear that by the Navajo Treaty of 1868 the aboriginal occupancy rights of the Navajo Tribe and its members to any land outside the 1868 reservation were extinguished. See also *Dubuque & Sioux City R.R. v. Des Moines Valley R.R.*, 109 U.S. 329 (1883). The above quotation illuminates one of the essential differences between the instant case and *Cramer* and *United States v. Santa Fe Pacific Ry. Co.*, namely, the fact that in those two cases the rights of the Indians (an individual in *Cramer*, and the Walapai Tribe in *Santa Fe*) against third parties (railroad companies or their vendees in both

cases), arose because the United States had not extinguished the aboriginal rights. In *Cramer* a further reason was involved, namely, occupation rights based upon improvements and enclosure of land, similar to settlement claims of non-Indians, as will be discussed further, *infra*. In *Santa Fe* the grant to the third party was only of lands which had been voluntarily ceded by the Indians, so there was a further question of voluntariness. Here, however, there are no such differences and the Navajo aboriginal occupancy rights or title had been extinguished by the 1868 Treaty. The rights of the third party, the State, therefore, and the rights of the Tribe are in an entirely different posture.

Archival Evidence of Post-1868 Indian Occupancy of Aneth Area

Before considering the Tribe's contention that the Utah Enabling Act, in effect, created or recognized a further tribal right of occupancy in lands outside the reservation, let us review the manifested facts of Indian occupancy and the manifested governmental actions toward the Navajos that are established by the record. We shall emphasize especially material which is not expressly discussed in the Director's decision. As the Solicitor stated in remanding this case for the hearing, "the resolution of legal principles in areas which have not been clearly staked out is better done with full knowledge of the facts involved." 72 I.D. 361, 366 (1965).

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There is little in the archival material presented by the Tribe concerning the decade following the 1868 Treaty. Of some interest is a report dated 1876 of an archaeological expedition by Jackson, entitled "A Notice of the Ancient Ruins in Arizona and Utah Lying About the Rio San Juan" (Nav. Ex. 137). He reported finding a skeleton which he identified as probably being a Navajo by the type of cloth uncovered with the remains. He stated that the Navajos had occupied the country "within the remembrance of the older persons" and were driven beyond the San Juan by the onslaughts of aggressive Utes.

Much of the archival material which can be related to the Aneth area for the years 1879 through 1885 pertains to a settler named H. L. Mitchell, who located a homestead at the mouth of the McElmo Canyon at the San Juan River, and also ran a store and trading post. Reports by military and Indian Office investigators of his alleged troubles with the Navajos bringing their sheep across the river and bothering the non-Indians living at McElmo blamed the troubles upon Mitchell. They indicated he would encourage the Navajos to go off the reservation by giving them "passes" and then complain that the troops were needed so he could sell supplies to the Army (Nav. Exs. 186, 226, 235).⁸ By letter of October 14, 1882

(Nav. Ex. 163), the Indian Agent Eastman, told Mitchell not to give the Navajos permits to go off the reservation, but to let them know they must not trespass on settlers' rights.

In a letter of October 31, 1882 (Nav. Ex. 164), Agent Eastman reported to the Commissioner of the Indian Office that Navajos said whites—not Mormons—told them to cross the San Juan River into Utah, but the Agent had ordered them back to the reservation. At that time, Eastman gave some passes

50 other "gentiles" that the Indians were friendly with the Mormons but not them, and the Governor of Utah had refused him arms to protect his settlement (Nav. Ex. 145). Military officials investigating the charges were skeptical and seemed to find him getting along well with the Navajos (Tr. 172). They also reported that he stirred up the Indians (Nav. Ex. 178). In 1880, however, his son and another white were killed by Utes or Paiutes (Nav. Exs. 149-53). On December 10, 1883, Infantry Captain Ketchum reported on his expedition in Utah to Bluff, the Montezuma area, and Mitchell's ranch (Nav. Ex. 189). He stated that Mormons were abandoning their ranches close to Mitchell and he had taken care of the incident with the Indians and Mitchell. He ordered the Navajos north of the San Juan to cross the river to their reservation.

In 1884 an incident occurred at Mitchell's ranch in which he killed one Navajo and wounded two others. The next day after Mitchell and his family had fled, Utes and Navajos sacked his place and stole everything (Nav. Ex. 199). They also plundered stores belonging to two other whites (Nav. Ex. 200). Later military reports were to the effect that the incident at Mitchell's was not significant, the Navajos were no longer around, and the Utes had returned to their area (Nav. Exs. 205, 206). A subsequent report implicated some Paiutes in the Mitchell affair, part of a group of about 40 Paiute "renegades" who lived in the vicinity of the Blue Mountains, and head waters of Montezuma Creek and Cottonwood Wash (Nav. Ex. 207). Another official stated the Paiutes were less to blame, but that they join the Navajo "in devilry" (Nav. Ex. 208).

⁸ Mitchell first complained in 1879 that 75 whites living at McElmo had been threatened by Navajos who brought 20,000 sheep through their homesteads (Nav. Ex. 144). He also complained at that time in behalf of himself and

to a number of Navajo headmen to hunt off the reservation (Nav. Ex. 165).

In an earlier letter of September 27, 1881 (Nav. Ex. 155), Agent Eastman reported that Navajos living north and west of the reservation had offered to help 40 "penitent" Paiutes in Utah, as they "used to be friends" and had intermarried with their people, but if the Utes returned to their bad life of "thieving and murdering" the Navajos said they would "hang them." A new Agent, Bowman, in December 1884, in response to complaints by settlers from McElmo about the Navajos, stated that the Navajos had a right to go off the reservation to hunt, but were subject to the same laws as the whites. He stated he would attempt to get the Indian police to try to restrain the Indians against making threats of violence (Nav. Exs. 222-24).

By February 23, 1885, Agent Bowman reported on his meetings with settlers and Navajos by the San Juan and stated that all but one problem was resolved, a conflict between a settler who had valuable improvements on the land and an Indian who had none and lived there but part time. He also stated that the whites said only Mitchell caused trouble and made complaints. He indicated that the Navajos were not on the public lands there, but 15 families and their flocks were on the Ute Mountain reservation (Nav. Ex. 227). During the period of 1885 through 1888, a few other complaints were made by residents of

Bluff and McElmo concerning the Indians off the reservation.⁹

Complaints from Utah citizens in 1889 and 1890 concerned Indians in the Blue and LaSal mountains which are north of the area in question here. These complaints involved Utes and Paiutes as well as Navajos.¹⁰

⁹ In November 1885, 21 settlers at Bluff requested that the Navajos be kept south of the San Juan River as they were crossing in great numbers with their stock and crowding off the settlers' stock and eating their grass (Nav. Ex. 239).

In 1887, a trader, Amasa M. Barton, was murdered at Rincon eight miles below Bluff on the San Juan River. Indians later came back and robbed the store. Mormons at Bluff requested a small detachment of troops to capture the murderer and robbers (Nav. Ex. 247).

In 1888, 19 petitioners from McElmo complained about Navajos being off the reservation and stealing. The Agent in his letter of December 15, 1888, reported that the Navajos crossed the river chiefly to trade. He suggested a trading post south of the river would keep them there (Nav. Ex. 249). Indian Agent Patterson responded that he would send his Navajo police to the area to keep the Navajos on the reservation. He didn't want them to cross the river (Nav. Ex. 251).

¹⁰ In the fall of 1889 the Governor of Utah reported that bands of Navajos and Utes were in the Blue Mountains hunting and alarming the citizens (Nav. Ex. 254). The Commissioner asked the Agent to have the chiefs and headmen return the Navajos to the reservation. The Indian Agent at the Southern Ute and Jicarilla Agency indicated the Ute Chiefs denied any trouble (Nav. Ex. 255). The Acting Commissioner of the Indian Office in a letter of November 7, 1889 (Nav. Ex. 257), to the Secretary of the Interior stated that 75 to 100 Navajos were reported off the reservation in Utah and that he recommended that the Secretary of War have the military return them. In a letter of December 11, 1889 (Nav. Ex. 258), he also ordered the Indian Agent to remove Navajos found within the Ute Agency and to avoid troubles with the whites. The military report of the investigation into the Blue Mountains in 1889 (Nav. Ex. 259), stated the cowboys complained that the Indians ran their cattle out of the mountains and made them wild. It also stated that the Navajos and Utes were hostile with one another. The Navajos would kill deer for the

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In 1893 trouble between the non-Indians and Navajos along the San Juan occurred in an incident at River View, Utah, but primarily involved the Indians in New Mexico, including the murder of a non-Indian there (Nav. Exs. 269-89). The new Indian Agent Plummer requested permanent military troops at Fruitland, New Mexico, as the Indians were increasingly stealing cattle and sheep outside the reservation. He requested military patrols to arrest Navajos north of the San Juan without passes, and advised that the Navajos' activities off the reservation should be confined to legitimate trading, because they had driven their sheep through others' pastures, killed cattle, and brought liquor back to the reservation (Nav. Ex. 289). In June 1893 he also instructed a "Farmer," employed by the Indian Agency to help the Indians, to try to keep the Indians on the reservation and to have them trade only with traders

hides only while the Utes would use the meat. The report suggested possible danger to non-Indians, as well, if the two groups fought each other. Except for a "renegade" band of Paiutes, the other Indians returned to their reservations. Trouble also occurred between whites and Indians in San Juan County, New Mexico, resulting in a cowboy killing a Navajo. To avoid further trouble the Agent reported he would get 25 Navajo families who were off the reservation to return (Nav. Ex. 260). On March 4, 1890 (Nav. Ex. 262), Agent Vandever reported to the Commissioner that he would enforce the Commissioner's order to return the Indians to the reservation except for those individual Indians off the reservation who had settled upon government land with the intention of complying with the land laws.

In 1890, petitions by citizens of Grand County and San Juan County, Utah, complained that roving bands of Utes and Paiutes and some Navajos were stealing their stock,

on their side of the river (Nav. Ex. 286).

In November 1893 Plummer received complaints from settlers at River View, Utah (close to the Colorado border on the San Juan River) that the Navajos were north of the river depleting the range and killing game (Nav. Ex. 296). He ordered the farmer at Fruitland, New Mexico, to go to Utah and arrest any Indians found outside the reservation without passes and impound their stock. He indicated that he had given a few passes to Navajos to hunt in the Ute and Blue Mountains (*Id.* and Nav. Ex. 298). He also recommended Bluff as the best place for interested lady missionaries to teach the Indians, as it was located across the river from the reservation and was visited by many Indians throughout the year (Nav. Ex. 297). In the spring of 1894 Plummer oversaw the placing of a teacher for the Indians at Bluff (Nav. Exs. 310, 311).

produce from their farms, killing game for hides alone, and causing the settlers to be in fear. This was in the area of the Blue and LaSal Mountains (Nav. Ex. 263). Vandever reported that he had sent his police to get the Indians to come in (Nav. Ex. 264). The Indians told them they had been living on claims from 12 to 21 years and intended to remain there. He declared he was powerless to do anything and they remained on their settlements. A rough draft of a reply to Vandever's report stated it was the policy not to force any Indian who had taken up his residence, separate and apart from his tribe to live on a reservation, that any Indian who had "made valuable improvements upon any particular tract and desires to continue in occupation thereof and obtain title thereto should be encouraged to do so and assisted, but that bands of Indians who merely roamed around with their flocks of sheep and goats should be placed on the reservation" (Attach. to Nav. Ex. 264).

That year in response to other complaints from citizens of Utah concerning the Navajos, Plummer sent the "Additional Farmer" from Fruitland, New Mexico, to Bluff to tell the Navajos to stay on their side of the river except when trading, and if they were arrested, he could not and would not help them (Nav. Ex. 314).

In the 1890's there was agitation by settlers and others in Colorado to remove the Utes from their reservation in southwestern Colorado and to place them in a reservation in San Juan County, Utah. This proposed new Ute reservation would include land within the 1884 Executive Order addition to the Navajo reservation as well as public lands. Plummer in a letter of March 13, 1894, to the Commissioner (Nav. Ex. 309) strongly protested against the proposal. He pointed out it would give the most isolated portion of the Navajo Reservation to the Utes, that the greater part of liquor traffic with the Navajos was carried out from shelter afforded by the present Ute reservation, and that the opportunity for lawlessness of all kinds would be increased by giving them an almost impregnable asylum.¹¹

An Eastern establishment, the Indian Rights Association, published a report in 1892 (State Ex.

40), also objecting to the proposal following a tour by its committee of the area. The area is described as a "no-man's land," but no Navajo settlements in the area are mentioned.

Citizens of San Juan County, Utah, also objected to the proposal and stated that the Utes were acting insolently and threatening the whites to leave. They suggested people were deceiving the Utes into believing they would be given San Juan County, Utah, as a reservation, and large annuities (Nav. Ex. 313). The Ute Indian Agent responded by letter of July 3, 1894 (Nav. Ex. 312), that the Utes went upon the public domain in Utah for forage because of encroachments on their reservation.

The Governor of Utah complained to the Secretary of the Interior that 300 to 500 Indians from the Southern Ute Reservation and 200 to 300 Navajos were in combination to oppose the whites in San Juan County, Utah, and requested troops to prevent conflict and bloodshed (Nav. Ex. 317). The *Rocky Mountain News* reported that landseekers in Colorado were trying to "kick" the Utes into Utah with the encouragement and aid of Ute Agent Day (Nav. Ex. 325). The *Durango Democrat* and *Durango Herald* (Nav. Exs. 321, 323) defended the rights of the Indians to graze in the Blue Mountains, in-

¹¹ He stated that in San Juan County, Utah, 8 Utes had "foiled" about 180 white men, soldiers and volunteers. He indicated that the Navajos living in that section of the reservation so far from the agency headquarters and separated by almost impassable rocky country were the least controlled and the area had proved an asylum for outlaws from all parts of the Tribe. To give these

people San Juan County would be a further outlet where whiskey could be obtained. He believed the proposed Ute reservation in San Juan County, Utah, was not in the best interests of the Navajos, the Utes, the Government and settlers adjoining the reservations (Nav. Ex. 309).

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dicating that whites had used the forage on the Ute reservation. Ute Agent Day supported the Utah proposal and reported to the Commissioner that reports were exaggerated, that the Governor of Utah was wrong, and that the cowboys were the hostile element (Nav. Ex. 327, 328). The Governor of Utah, however, complained to the Secretary of the Interior that Agent Day was causing the trouble by telling the Utes to go out on the public land in Utah (Nav. Ex. 320).

Agent Day further reported to the Commissioner on December 14, 1894, that there were no people between Bluff and Monticello, only a few cattle companies and a few Utes who had used the winter range (Nav. Ex. 334). He continued his urgings that the Utah area be made the proposed reservation for the Utes as it was held by a few cattle men and renegade whites "worse than Indians," and that only 117 votes were cast in the last election in San Juan County (Nav. Ex. 339). In a military report, dated December 13, 1894, of the situation, Lieutenant Colonel Lawton stated that trouble between the Indians and non-Indians resulted because it was the first time the Indians had come into the Utah area in such large numbers saying they would stay there. He reported that a band of Weeminuchee Utes under Ignacio were returning to the reservation, but a group of about 95 Utes and about 80 Paiutes under Bennoow, who had never resided on the Ute Agency, would not move and

it would take troops to move them to the reservation and keep them there (Nav. Ex. 341).

In December of 1894, new acting Navajo Agent Williams reported to the Commissioner that the Navajos were in an impoverished condition due to droughts, and had undoubtedly killed non-Indians' cattle and sheep north of the San Juan to keep from starving (Nav. Ex. 329). He stated that a number were off the reservation with their flocks of sheep "trespassing on the impoverished ranges of Utah" and he would order them back on the reservation "although it would be like condemning them and the sheep to death." *Id.* In January 1895 Williams reported to the Commissioner that 400 to 500 Navajos were destitute and were killing sheep and ponies of others on the reservation and he had received complaints from three places outside the reservation of such killings, that all of the trading posts on the San Juan but one were closed and the one, Noland at River View, Utah (see Nav. Ex. 347), had no trade because the Indians had nothing to sell. He requested food and supplies (Nav. Ex. 344). They were issued (Nav. Exs. 346, 348, 349). A claim by Noland for stock allegedly lost to the Navajos was made (Nav. Ex. 350).

In May 1896 Ute Agent Day reported to the Commissioner that Ignacio requested troops to remove Navajos from the west end of the Southern Ute reservation; they had promised to go early in the spring

but now refused and claimed the land as theirs; they were menacing the Utes and monopolizing the pasture and waterholes with their vast herds (Nav. Ex. 351). In August 1896 Navajo Agent Williams reported that as soon as the Navajos' crops within the Ute Reservation were harvested they would leave (Nav. Ex. 352).

On August 22, 1897, a resident of Holyoke (McElmo), San Juan County, Utah, complained that Navajos' sheep ate her crops and the Navajos threatened her if she attempted to drive the sheep off (Nav. Ex. 355).

Some of the history reflected in the documents for the next two decades concerns Howard R. Antes, who located a small mission at Aneth on the north side of the San Juan River in Utah. He used this as a school, teaching up to 15 Navajo children. He later apparently also operated a trading post.

On November 14, 1898, he complained to the Secretary of the Interior concerning a Fred Adams of Bluff, who claiming to be a county official taxed Navajos for grazing their sheep on the Government land north of the San Juan River. Antes stated that the land was worthless and only inhabited by several traders and two men who had a few acres in cultivation and desired to use the land for grazing themselves. He requested that Indians, or at least the Navajos, be allowed to leave their reservation temporarily to get subsistence for their flocks and that they be exempt from taxation (Nav.

Ex. 358). By letter of December 2, 1898 (Nav. Ex. 359), the Commissioner reported to the Secretary of Interior that for several years "a few of the Navajos and a number of Southern Utes as well, have been finding subsistence for their flocks in San Juan County, and this with the tacit consent of the office." He stated that as wards of the Government they should be permitted to graze their stock on public lands and that the county should have no right to impose any grazing license tax upon them. He recommended that Antes be advised to inform the Indians that they should pay no taxes on their flocks to anyone, so long as they are kept upon the unoccupied lands of the United States. He also advised that Antes should lay all the facts relative to Adams' conduct before the prosecuting attorney in San Juan County with a request that he take action. He then stated:

It is not deemed wise to officially notify the Indians of the Navajo Reservation that they are at liberty to leave their reservation when they please to occupy lands outside and they should not be encouraged to do so. A system of irrigation on this reservation is now in course of construction, and when completed, the Indians will have no reason for going outside for grazing or for agricultural land.
Id.

The record does not contain the Secretary's response, but Antes in a letter of February 2, 1899, to the Commissioner (Nav. Ex. 361), stated that the Commissioner's letter to the Secretary was forwarded to him with the Secretary's concurrence "that the Navajo Indians could graze their flocks off of their

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reservation without being obliged to pay taxes to white men who do not occupy it." He requested that supplies be sent to the destitute Indians. On December 14, 1898, Navajo Agent G. W. Hayzlett reported of complaints from people in Utah of Navajo depredations (Nav. Ex. 360). He also stated that he had written some of the parties that in his opinion the Indians had the same right to occupy and graze on the public lands that the whites had subject, however, to the same laws of the State or territory, as the whites, and that he would ask the Department for advice. He also stated the Navajos were selling their sheep to traders and others but he directed his police to arrest any who did so. He also wrote to Antes on November 2, 1899, to advise the Indians not to sell their stock as once they did, they would have nothing (Nav. Ex. 362). Antes took it upon himself to issue "passes" or "permits" to the Navajos to go on the public lands.

In January 1900, Kate Perkins, Clerk of San Juan County, Utah, complained to the Commissioner that the County derived its revenue from taxing stock, that the range was in bad condition due to drought and stocked to its utmost capacity, and that the Indians refused to remove their stock across the river because of permits issued by Antes. She asked what authority he had to issue them and enclosed a copy of the "permit" from Antes (Nav. Ex. 365). The Governor of Utah also asked the Secretary of the Interior

as to Antes' authority to issue permits. The record does not reflect the Secretary's reply, but it does reflect a letter of January 22, 1900, by the Commissioner to the Secretary (Nav. Ex. 366 and encls.), which avoids an answer to that specific question, misstated the facts concerning the "permit", and refers to his letter to Hayzlett of March 3, 1899, advising him that:

* * * many persons living in Utah just across the northern boundary line of the Navajo Reservation had complained about the Navajo Indians entering San Juan County with their herds, for the purpose of grazing the same, upon a permit issued to the Navajo Indians by a proper County official of the said County; that in reply he had advised the complainants that in his opinion the Indians had the same right to occupy and graze on the public lands as had the whites provided they comply with the laws governing the whites and he requested that he be instructed in the premises.

In reply, the office, under date of March 3, 1899, advised him as follows:

In reply you are advised concerning the first subject that this office is of the opinion that Navajo Indians who comply with all the laws of the State of Utah and pay for and obtain a license to own, raise, or pasture their livestock within the lands of the said State, would have just as good a right to do so as have the whites. While you are expected to restrain and prevent so far as practicable Indians under your charge from going off the reservation for such purposes, yet it is very much doubted that you have a legal right to prevent them by force from peaceably leaving the reservation for this purpose. There would seem to be no remedy for this state of affairs except that of using moral suasion and your

personal influence over them. Of course, they should be warned that when they leave the limits of their reservation and enter territory within the jurisdiction of Utah they are subject to all its laws and also to arrest and punishment by the proper state authorities in case they violate any of such laws. If, therefore, the Indians while off the reservation and in Utah commit depredations on the stock of settlers and otherwise annoy them, the stockmen and others must seek relief under the State laws. You are expected, however, to use such influence as you may have over them to cause them to give up these expeditions and stay within the limits of their reservation. * * *

From this report from the Agent, it is thought that the permit referred to by Miss Perkins as giving the Indians permission to graze their cattle is one that has been issued to them upon payment to the proper County officials of a grazing tax or license. If, as is supposed, the Indians have complied with the grazing laws of this County, it is not seen but that they have just as good a right to graze their stock as the whites, provided, of course, that they do so peaceably; and it is hoped that they will in justice be allowed the same privileges as the white stockmen enjoy.

The foregoing contains the most specific references to the San Juan County, Utah, area in the archival materials prior to and during the year 1900. Other materials relate to the Navajos generally. There is no evidence that the Indians complied with the state laws. For the next decade, the people from Bluff and people involved with the Antes' mission at Aneth figure most predominately in the archival material.

In March 1901 (Nav. Ex. 371), Utah Senator Thomas Kearns reported the Governor of Utah claimed the Navajos and Utes were

engaging in depredations. The Ute agent stated that the Utes did not bother anyone and owned few sheep and goats at the Navajo Spring Agency, but suggested the Navajos were the subjects of the reports because the Navajo reservation was to the south, and many of the Navajos owned large herds of sheep, cattle and ponies, and some grazed their stock in Utah and hunted there. He stated that houses alleged to have been built on the north side of the San Juan River were not built by Utes, nor did any of them have any intention of residing there (Nav. Ex. 372).¹²

In September 1902 settlers at Bluff petitioned the Secretary of the Interior for help for the Navajos who within a radius of 50 to 75 miles of the town were in a destitute condition (Nav. Ex. 375). Indian Agent Hayzlett went from the mouth of McElmo Creek along the San Juan River and requested the Indians to come see him, none said they were hungry and refused an offer of a \$1 a day job with the railroad. He saw few sheep as most of the Navajos had their flocks out in the mountains as there was no grass along the river, but some had crops

¹² In May 1901 the Ute Agent found 8 to 10 Navajo families within the Ute Navajo Springs Agency who claimed they had the Navajo Agent's permission to plant crops there that spring. He stated that for the last 5 or 6 years some of the Navajos had done so. He requested the Navajos be informed to stay on their own reservation and asked for their police to remove them. In reply the Navajo Agent at Ft. Defiance stated he had never given the Navajos permission to enter the Ute reservation for any purpose, but asked that they not be removed until they harvested their present crop (Nav. Ex. 373 & Enc.).

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of melons and pumpkins which "looked good and a number of ditches." He stated that there was not a white settler on either side of the river about Bluff nearer than 70 or 80 miles "still the people in the state want the Indians called back to the reservation." He advised them to stay and improve the lands, and make permanent homes if they liked and if they desired to file on the lands, he would assist them. Three said they wanted to remain and make permanent homes, and he asked Antes to assist them with their papers. He asked for additional farmers and additional irrigation development work (Nav. Ex. 377).

Other reports were made of poor conditions of the Navajos. These pertained to Indians inside the reservation, as well as any outside. On November 17, 1902, Hayzlett discounted reports that 6,000 Navajos were starving as the Census Bureau for that "whole district" (apparently the northwestern part of the reservation) showed only 1,747 (Nav. Ex. 381). However, subsequently, he reported that Indians along the mountains and in the Chinle Valley which extends from Cana Desha north to the river opposite Bluff were in need of food, but the Indians along the river were all right (Nav. Ex. 392). This was in agreement with a letter from Mary Eldridge in December 15, 1902, to the same effect (Nav. Ex. 384).

In December 1902, Miss Sophie Hubert who worked at Antes' mis-

sion wrote to the Commissioner requesting more schools for the Navajo children. She stated there were 15 children at their school but that there were 50 to 60 more children living within 10 to 12 miles up and down the river (Nav. Ex. 383).

William T. Shelton, Superintendent of the Navajo San Juan School, Farmington, New Mexico, in his letter of April 30, 1904, to the Commissioner reported on a trip to Aneth. He stated that about 95 percent of the Indian country he passed through was a wild, barren, inhospitable waste, devoid of all vegetation, except for an occasional growth of cottonwood trees along the river. The remaining 5 percent consisted of small sandy tracts located here and there along the river; some of which were being cultivated by the Indians when possible to get water and in a most primitive way. He stated:

The general condition of the Indians west of the Four Corners, and along the river where most of the Indians are located, as to ideas, customs, morality and progress, is far below the average of the Navajos heretofore met with.

But those below Aneth and about Bluff City,

with all of their bad points most of them will work when given the opportunity, and if afforded the proper assistance could no doubt accomplish something, as they frequently take out ditches themselves; but which are usually washed out at the first high water, owing largely to their primitive structure.

(Nav. Ex. 397).

On April 18, 1904, Antes asked the President to extend the Navajo

reservation north of the river at Aneth (Nav. Ex. 399 Enc.). He stated that several small bottoms of the San Juan River on its north bank had been occupied by Indians for many years and are occupied by them. He stated that the land was government land subject to settlement, but no filing had been made upon it, although "there have been numerous attempts to settle upon it by white men, but in every case, it has been abandoned as impracticable except that three trading posts have remained." He requested the area to be reserved for the Indians except for the sites of his mission and school and the Aneth Post Office which he conducted. He stated:

The Indians have all along come across the river, from their reservation, and have camped here, and sometimes built themselves cabins and tried to raise crops. No one but Indians want any of this land for homes, and yet there has been more or less friction, and a constant probability of contention and eviction by stockmen who want the whole country for their stock.

The Commissioner questioned whether the Indians would not be amply protected by allotments or Indian homesteads (Nav. Ex. 399).

Superintendent Shelton in his report to the Commissioner, dated July 30, 1904 (Nav. Ex. 403), recommended against allotments or Indian homesteads because of the isolated conditions, the Indians' few opportunities to come in contact with civilized people, and because these Indians were far behind the Indians located on some other parts

of the reservation. Although he had not at that time made a trip to inspect, he recommended the addition to the reservation suggested by Antes.¹³

The March 2, 1905, letter by the Commissioner to the Secretary of the Interior (Nav. Ex. 412) recommended the addition to the reservation and referred to a report by Shelton, dated February 15, 1905, of a recent trip he made into the area.

¹³ Shelton placed on a rough sketch (not included with Nav. Ex. 403, but separate as Nav. Ex. 1) where he had remembered the different settlements of Indians are located along the north side of the river in Utah and inside the boundary in question. He estimated 250 Indians in the area, but said the number may be considerably more or less. He stated he had only been a few miles below the mouth of McElmo Canyon and had little idea of the number and location of the Indians between there and Montezuma Creek. He could remember only one tract of land about 500 acres, which seemed to be of agricultural potential, located 2 miles below the mouth of McElmo Creek, but this would require the "taking out of a good ditch, before it will be of practical use to the Indians." Other small parcels of land up and down the river were in danger of being destroyed by high water at any time. "To more fully demonstrate the poor condition of this land, it has been frequently located and settled upon by white people, who in every instance, have starved out and given it up." The best benefit for the executive order reservation would be to protect grazing land for the Indian stock. He had been told that stockmen near Bluff, "frequently run in thousands of sheep in this section, which eat out what little food there is, leaving the Indian stock to suffer." (Nav. Ex. 403.)

A Harriet Peabody (who had been teaching at Aneth for 5 years) in a letter of July 8, 1904, to the Commissioner recommended allotments for the Indians. She had checked the surveys and found that one camp is just below the survey which ends at the Butter Canyon. "Near Aneth the Indians have their lands all fenced, their irrigating ditches made and are doing quite good farming." She couldn't understand why Shelton didn't think they were ready for allotment, but indicated they needed schools and "someone to assist them in their work and to teach them to respect each others rights" (Nav. Ex. 402).

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Shelton said he had found 250 Navajos living within the boundaries of the proposed area, but no white settlers, except three traders, that the Indians had lived there many years, using the range for grazing their stock, and "although it is very poor grazing land, it would be cruel not to protect their rights and permit them to remain there unmolested." He found no evidence of Indian depredations, only strong exchanges of words between an Indian sheep grazer and a white grazer about sheep. He stated "if whites would stay away and leave the Indians alone there would be no complaints."

The President by Executive Order of March 19, 1905, approved the extension as described by Antes, an area bounded on the north by a line extending from the mouth of the Montezuma Creek eastward to the Colorado state line (Nav. Ex. 399). Because of difficulties involved in surveying the boundary of the extension of the reservation as described in that order, a new executive order modifying the description was recommended to conform to survey lines (Nav. Exs. 415, 416), and approved as Executive Order No. 324A of May 15, 1905. 2 NAVAJO TRIBAL CODE 342 (1970).

Protests against the 1905 Executive Order addition to the Navajo reservation were made by the Commissioners of San Juan County, Utah (Nav. Ex. 420), and the two senators from Utah, George Sutherland and Reed Smoot (Nav. Ex. 421). One of the concerns of the

Utah people was that further reservations in Utah would be created and Indians from Colorado and Arizona would be moved in as had happened years previously when a large number of White River Utes were taken out of Colorado and brought into Utah in the Uncompahgre Reservation in Uintah County. The Acting Commissioner responded by saying:

The office is not aware that any steps have been taken looking to the withdrawal from sale and settlement and setting apart for Indian purposes, any other small reserves or reservations of any kind * * * Should application be made for such purpose upon the part of the Indians or those interested in their welfare, the matter would receive thorough investigation and very careful consideration before presenting the subject to the Department. It may be added that there is no information now before the office to justify the setting aside of other reserves for Indian purposes in San Juan County, Utah, and that the Office has no present intention of recommending such action (Nav. Ex. 426).

This statement belies any contention that the manifested governmental policy at that time envisaged any withdrawal or governmental appropriation of public lands for Navajos in Utah outside the reservation limits as extended by the 1884 and 1905 Executive Orders. Instead, the necessity for individual Indians to make settlements in accordance with the laws is manifested in a report by Shelton during that same year (Nav. Ex. 423).¹⁴

¹⁴ Shelton visited Aneth and Bluff following charges made by Harriet Peabody and her friend J. M. Holly, (whom she was trying to get employed as an additional farmer for the Indian Agency at Aneth), that Mormons

He described two Indian settlements, one by a Navajo Tom, and Jim Joe's camp, 10 miles below Bluff, as follows:

There is not more than 50 acres in either of these tracts and they are practically cultivated in common by the Indians. The farms at both of these camps are mixed up, the Indians farming patches here and there without regard to lines, and it will take some time with a good interpreter to get them to understand that they should each choose a certain amount of land and locate on it permanently in order that it may be legally held by them. Each of the Indians who have farms, with improvements, at these camps should be taken care of when these locations are made, but it will be a difficult matter and will take considerable time to get them to understand the importance and necessity of having their lands laid out to conform to the section lines or in a more regular manner.

I have requested the Surveyor General and the Register of the U.S. Land Office not to permit any white settlers to locate on any of these lands; and will take steps as early as possible to locate the Indians permanently upon the lands.

In addition to giving notice to the Land Office of Indian settlements, notices were also given to Indians who made settlements outside the reservation, warning others not to interfere with their rights.¹⁵

from Bluff were removing Indian fences and house logs and blocking their roads (Nav. Exs. 408, 411). After investigating the charges, Shelton reported July 25, 1905, that there had been no such trouble, that the Indians said they had no trouble about roads or fencing, and that they had sold some poles and old logs to the people at Bluff (Nav. Ex. 423).

¹⁵ See, e.g., Nav. Ex. 427 of that same year. Similar notices had been issued earlier to protect Navajos outside the reservation in other areas who had settled and made improvements deemed in compliance with the homestead laws, e.g., Nav. Exs. 301, 304-306, in 1894, and Nav. Exs. 174, and 181 in 1883.

The understanding that the extension of the reservation by the executive order would not affect prior rights and also the fact that there had been exploratory mining activities along the San Juan River is reflected by a report by Shelton in that year (Nav. Ex. 419).¹⁶

Proposals for schools for the Navajo children in Utah gave two locations: one at Bluff where the citizens offered to sell the town improvements to the Agency (Nav. Ex. 430), and at Aneth, where Antes maintained his small school. In 1905 Superintendent Shelton had recommended the establishment of a boarding school at Aneth, saying that there were "something near a thousand Indians living in the section contiguous to this point," that those Indians were more ignorant and less progressive than those on other parts of the reservation (Nav. Ex. 407). No action was then taken.

¹⁶ On June 13, 1905, Shelton reported to the Commissioner that there were 113 placer mining claims within the new addition to the reservation which he would investigate (Nav. Ex. 419). On July 24, 1905, he reported that the mining claims were located in 1904, except for two groups of claims of 160 acres each on March 9th and 10th, 1905. He recommended that if the claimants had filed on the property in accordance with the laws they be permitted to work their claims as they were not located on the lands occupied and used by the Indians. He believed the mining claimants would soon give up, as "numerous attempts" had been made to extract flaked and flour gold from the sand and gravel in the river. He also believed the claimants were interested in obtaining eastern capital and then selling the claims, but felt that if they were required to do their assessment work and to comply strictly with the mining laws, they would not be on the reservation longer than one year.

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In 1907 Antes closed his mission school (Nav. Ex. 433) and requested the Government to protect his property from the erosion by the river (Nav. Ex. 434). Of course, at this time, the area was within the 1905 Executive Order reservation. On February 13, 1907, Shelton described the Aneth area at the mouth of McElmo Creek as 500 acres of river bottom land on which 30 families of Indians lived year round with permanent homes and improvements and 200 acres cultivated. He requested \$1,000 for riprapping to prevent river erosion (Nav. Ex. 436). However, on April 16, 1907, Shelton recommended against the preventive work as the river had already carried away much of the land and property, only one Indian would be affected and it was cheaper to move him than to take protective action against the river (Nav. Ex. 441). On June 10, 1907, Shelton reported only one family remained at Aneth, the rest were all scattered (Nav. Ex. 495).

Sometime prior to 1916 a government school was built at Aneth, but at least as of June 20, 1918, the school was not being used and an inspector recommended against its use, suggesting it would be better to transport the pupils to the San Juan school (Nav. Ex. 554).¹⁷

¹⁷ A report of a special agent's inspection of the reservation in 1916 indicated that a school had been built at Aneth, apparently to get rid of Antes by buying his old house. The agent criticized the location because of the proximity to the river and its location on the "most barren, desolate and desert looking spot one could find anywhere, * * * far away from the world." He stated that the Indians were anxious to have the school open

In 1907 more complaints were made concerning Indians off the reservation. In response to a letter complaining that the Utes and Navajos were monopolizing the stock range on Montezuma Creek, Shelton stated it had been impossible for him to handle the Indians properly in that section, being located so far away, and he was not in a position to say just "what rights the Indians have off the reservation, or that whites have any more rights than Indians, as he had never been advised" (Nav. Ex. 497).

On July 9, 1907, the supervisor of the then Monticello National Forest, which is north of the 1933 extension area, complained of about 50

and were in favor of educating their children, "although they are the poorest, most backward and most neglected Indians on the Reservation" (Nav. Ex. 551).

Antes by that time was considered a troublemaker. As early as 1899 Antes' reputation was questioned (Nav. Ex. 363). Later Shelton reported he was not to be believed and that he made money presumably from donations to his mission for very little appeared to have been expended on the Indians (Nav. Ex. 472).

In 1907 Antes had made charges against employees of the Indian Office, from the Commissioner to the Superintendent, his wife, the farmer at Aneth, and military personnel and Mrs. Peabody. After an investigation he retracted these charges. Col. Scott of the Army investigated the charges. He found that Antes had a bad reputation, was a troublemaker and had caused some of the unrest among the Navajos at that time. (Nav. Ex. 474.) Antes' reputation apparently was also not favorable among some of the Indians. In statements many indicated they had never heard of him bringing or sending any provisions to the settlement for the Indians, he had not treated the children at his school well, and had lied concerning conditions of the Indians in that area (Nav. Ex. 442a and Encs.). Antes left the reservation after retracting his charges, but later returned. In 1911, the Superintendent reported Antes was trading with the Indians without authorization, getting their sheep and then grazing them within the reservation without a permit (Nav. Exs. 538a, 543).

"renegade" Utes and Navajos committing depredations (Nav. Ex. 499). Many of the archival materials from 1907-1909 concern incidents involving a band of Navajos led by Bai'alilii (By-a-lil-le), and Polly, their arrest on the reservation by military forces about four miles from Aneth south of the river, their imprisonment, and subsequent release (Nav. Exs. 442, 445, 446, 474, 489, 514-518). As reflected from these documents this group and their leaders were considered by Government officials to be the major source of trouble between the Navajos and the non-Indians and among other Navajos.¹⁸

In one of the reports of the military expeditions into San Juan County, Utah, following these difficulties, on August 12, 1908, military personnel stated that the merchant at Bluff had traded with about 950 adult Navajos and 65 Utes at his store the past year (Nav. Ex. 478).

¹⁸ By-a-lil-le was reported to be a medicine man and many of the Indians considered him to be a witch and were afraid of him (Nav. Ex. 474, Tr. 419). The Superintendent reported By-a-lil-le tried to influence other Indians against sending their children to school, against restrictions on selling their sheep, and against changes in Navajo marriage customs (primarily to do away with polygamy) (Nav. Ex. 437, see also Tr. 580). Col. Scott reported that the capture of By-a-lil-le was well handled and was warranted as he had made threats to kill the superintendent and farmer, had terrorized neighboring Indians, "had interfered with the peace, order and progress of the community," and he and his followers were well armed. "If therefore the Government desired to maintain its supremacy and give protection to the white settlers in Utah, Colorado and New Mexico, as well as to the law abiding and progressive Indians, the arrest of By-a-lil-le and his supporters was imperative" (Nav. Ex. 474).

He reported the Utes lived in the vicinity and caused trouble, but the Navajos were well-behaved and did not. One-half of the Navajos had houses within a radius of 60 miles from Bluff, but the remainder roamed from place to place having no "permanent section." This could include an area within and without the reservation then established.

In 1910, in addition to minor complaints such as an Indian having a non-Indian's pony (Nav. Ex. 529), while non-Indians took an Indian's cow (Nav. Ex. 526), the Utah Fish and Game Commission complained that Navajos and Utes were violating the State's laws, especially by killing deer in large numbers by driving them over ledges (Nav. Ex. 530). The Commissioner advised local agency authorities to warn the Indians against violating the State's game laws and to tell them they were liable to arrest if they did so. *Id.* Superintendent Shelton promised to cooperate with the State authorities and to continue to warn Indians not to violate the State laws. He gave some Indians permits to hunt outside the reservation, however (Nav. Ex. 531).

During the next decade, the archival material sheds little light on Navajo occupancy in this area, except for a report by the Navajo Superintendent on November 15, 1917 (Nav. Ex. 553), that a number of Indians were living outside the reservation in Utah, at least four of whom had made considerable improvements and had constructed irrigation work of some value, but

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white settlers were beginning to crowd them out (Nav. Ex. 553). He suggested they file Indian homesteads on their improved lands. There is no indication as to just where those Indians were located.¹⁹

Between 1914 and 1923, the most serious trouble between Indians and non-Indians in San Juan County, Utah, appears to have been with a group of "renegade" Utes and Paiutes led by Polk and Posey (Nav. Exs. 552, 556, 560, 562). This group in the past had continually refused to go to the Ute reservation. A proposed solution was to give them allotments. In 1923 a special allotting agent recommended allotments for the Posey Band in Allen Canyon (which he identified as meaning the creek named Allen Canyon, Hammond Canyon, and Cottonwood Creek) (Nav. Ex. 562). These are north and west of the area in question here. About 125 to 150 Utes in the Polk band claimed Montezuma Creek as their home. He stated they had nothing in the nature of improvements, some had raised corn on Montezuma Creek in the past, but they had gone away and the land had been filed on by non-Indians, some had sold what they called their homes to white men, but at present they had nothing, and he did not think a contest could be successful against white men filed on land occupied by the Indians.

¹⁹ In 1911 the Superintendent of the Ute Navajo Springs Agency complained to the Commissioner that Navajos were grazing on the diminished Ute reservation, which adjoins this area to the east (Nav. Ex. 536).

Of most interest here, he indicated that from the Rentz's store in T. 39 S., R. 24 E., south to the mouth of Montezuma Creek the land was occupied by Navajos who lived there all the time and made good use of the land. *Id.* He made no recommendations for the Polk band as the land in Montezuma Creek north of the store for seven miles was homesteaded.

Pressure for land in the area was increasing by 1921 for the Farmer at McElmo reported that white stockmen were encroaching upon the reservation (Nav. Ex. 559). He stated that the oldtime stockmen had been very reasonable and had a tendency to observe the range rights of others, but because the open range was being taken by settlers, the sheep and cattlemen were engaged in a scramble for what range was left. He stated the new and younger elements had decided to defy them claiming they could not be forbidden from herding their stock on the reservation because there was no fence separating the reservation land. The Superintendent advised the Farmer of statutory authority to remove non-Indians from the reservation and to prevent them from trespassing upon it. *Id.* Much of the archival material in the late 20's and early 1930's pertains to meetings, letters, and reports which led up to the 1933 Act extending the boundaries of the Navajo reservation.

Administrative Policies Toward Navajos Outside the Reservation

We have previously mentioned that the Navajo reservation established by the 1868 Treaty has been enlarged. It is now more than double the size of the 1868 reservation. See the executive orders and statutes adding land to the reservation set out in the appendix in 2 NAVAJO TRIBAL CODE (1970). The archival materials include some of the requests by the Navajos, and reports and investigations which led up to specific additions to the reservation. Thus, the first Navajo request reflected by the record was made in 1876, with the Navajos claiming their population was growing and there was not sufficient land within the reservation to sustain them. They asked for an addition to the reservation with the Mancos Creek being the north boundary (Nav. Ex. 138). That would have included lands in New Mexico and Colorado in the Four Corners area, but not Utah. That request was not granted, but by Executive Order of October 29, 1878, a large area west of the Treaty reservation was added in Arizona and by Executive Order of January 6, 1880, an addition to the south, west and east was made in Arizona and New Mexico.

From the period of the 1880's, 1890's and early 1900's, reports, often of special investigators of the reservation, or of the Indian agent in charge, generally stated that many Navajos were living off their reservation. Except for reports that

have previously been mentioned, complaints concerning the Navajos appear to have been in the New Mexico or Arizona area. At times the reports recommended additions to the reservation to meet the growing Navajo population needs; other times, they only recommended further appropriations and help, and especially water and irrigation development within the reservation.²⁰

²⁰ For example, on July 31, 1882, Indian Inspector Howard (Nav. Ex. 159), reported at least 8,000 Navajos off the reservation in Arizona and estimated over half the Navajo Tribe was outside the reservation boundaries. He recommended the reservation be extended 100 miles to the west with the north boundary the line between Utah and Arizona, that the Navajos who lived only by stock raising be required to stay on the enlarged reservation, but Navajos who had fixed farms be given special passes and allowed to remain where they were.

In 1883, Agent Riordan stated that the reservation was too small to support the 17,000 Navajos and requested help and resources (Nav. Exs. 169, 170, 175). The next year he took some Navajo chiefs to Washington to present their land problems to officials (Nav. Ex. 193). In 1886 a special agent visited the San Juan area in New Mexico and recommended an expenditure of \$50,000 for irrigation works within the reservation (Nav. Ex. 239). With the development of water and restoration of a small strip of land in New Mexico to the reservation, he believed the reservation could support the Tribe and the Navajos should be brought upon the reservation when water was developed. (This small area had been added to the reservation by Executive Order January 6, 1880. The small strip was opened to the public land laws in 1884, but restored to the reservation in 1886.)

On March 1, 1889, Indian Agent C. E. Vandever, recommended a small extension of the reservation to the south. He generally recommended that all non-resident Indians be compelled to live within the reservation, and keep their flocks and herds within it to avoid trouble between them and white settlers (Nav. Ex. 253).

In July 1892, the Commissioner requested the military to make a survey of the reservation to show the conditions of the people, their water resources, etc., so he could make recommendations in view of the friction between the people of New Mexico and Arizona.

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It is apparent from the archival material that during this same time period there was some vacillation in the views of the Indian Office and military personnel concerning Navajos leaving the reservation to graze their herds of sheep, goats, and horses. Prior to 1895, the evidence clearly shows those personnel ordered Navajos who roamed the area with their flocks to return to the reservation, but permitted Indians making settlements to stay and comply with the laws. As the population of the Tribe increased, their flocks increased, and range conditions within the reservation deteriorated, such personnel in-

and the Navajos (Nav. Ex. 265). Nav. Ex. 266 is a report of part of this survey by Lieutenant Odon Gurovitz. On the San Juan in Utah he reported that McElmo Creek, Montezuma Creek, Recapture Creek, etc., were then dry. Within the reservation he recommended the irrigation of only one strip near Bluff with the settlers there to receive the contract to do the work and teach the Indians. The report of the Commissioner to the Secretary dated February 10, 1893, requested appropriations for irrigation works, employees, etc., based on the survey reports of the entire reservation area (Nav. Ex. 268). He stated that 9,000 of 18,000 Navajos were off the reservation but shouldn't be returned until the water resources were developed.

In December 29, 1893, Plummer reported to the Commissioner that the reservation and the Indians were in an impoverished condition and requested agricultural supplies and additional farmers. He indicated he received complaints about the Indians leaving the reservation especially to the south and west and recommended extending the reservation to the Little Colorado River on the west and making the southern line an extension of the Moqui (Hopi) reservation. If this were done he suggested the whole tribe could be induced without difficulty to occupy only their own lands (Nav. Ex. 300) (A large area west of the Hopi reservation, created by Executive Order of December 16, 1882, was added to the Navajo reservation in Arizona by Executive Order of January 8, 1900).

As to complaints by an agent for the Atlantic and Pacific Railroad at Gallup, New

creasingly recommended either a course of non-action by Government officials or persuasion by "discreet and judicious" means to return the Navajos to the reservation without first using military force (see, *e.g.*, the Acting Secretary of the Interior's letter of April 9, 1887, to the Commissioner (Nav. Ex. 246)). However, until after 1900, if there were complaints in San Juan County, Utah, concerning the Navajos in that area, officials usually ordered them back to the reservation unless they had made a substantial settlement. It is evident that because of the desolation and difficulties in communication and transportation to that area, many of the Indians

Mexico, that settlers did not want to purchase intermingled railroad land adjoining lands occupied by the Indians, Plummer stated that he could not do much about the Indians leaving the reservation and suggested the agent help to get further appropriations for the Indians (Nav. Exs. 300, 302). He also requested the Governor of New Mexico to get help in having water developed on the reservation by the Government, suggesting it could support twice the number of Indians "even with their extravagant, improvident habits" (Nav. Ex. 303). He requested an allotting agent especially to help Indians living to the south and east of the reservation (Nav. Ex. 307). Thereafter some allotments were made (Nav. Ex. 308). The need for water and irrigation work to be done within the reservation was emphasized by an inspector of the reservation in 1896 (Nav. Ex. 353). He noted that hundreds of the Navajos were entirely off the reservation.

An inspection of the Navajo reservation was made in 1901 by a special agent (Nav. Ex. 374) who generally considered the Navajos to be able to take care of themselves with respect to their grazing activities. He stated that many of the flocks were ranged outside of the reservation and changed from summer to winter range "and so far as the agent or his employees are concerned, they have no care or supervision over them." His inspection appeared to be in the New Mexico area, and he recommended that the farming potential of that area be exploited.

there received little supervision. At times, as the incidents at Mitchell's ranch and at Antes' mission show, they were influenced to leave the reservation by the inducements of non-Indians. They also left the reservation periodically to trade.

There was no recognition in the evidence that the Tribe had any rights to the land outside the reservation but only that individual Indians could acquire property rights by compliance with the settlement laws, in accordance with the general policy of encouraging individual Indians to make permanent settlements and farms and abandon nomadic or semi-nomadic wandering.

In 1881, Agent Eastman protested against an order by the commanding military officer General William T. Sherman that all Indians living off Indian reservations would be considered "hostiles," and requested the Navajos be excepted as many had always lived off their reservation, especially along the line of the Atlantic and Pacific Railroad (not near the Aneth area) (Nav. Ex. 154). Sherman responded that the reservation as enlarged was big enough to accommodate the Tribe and that he had advised the Navajos at the time of the 1868 Treaty that if they relinquished their tribal rights and adopted white ways they could acquire land outside the reservation (Nav. Ex. 156). This reflects the understanding at that time that if an Indian gave up his tribal affiliation and became a citizen he could acquire public lands in accordance with the general public land laws.

Some of the archival materials al-

lude or refer specifically to circulars of the General Land Office [now the Bureau of Land Management] giving instructions concerning the protection of Indian occupants of land (Nav. Exs. 213, 214, 219, 221, 240). These circulars were issued following enactment of the 1875 Indian Homestead Act.

Circular dated May 31, 1884, 3 L.D. 371, to the Registers and Receivers of the Land Offices states:

Information having been received from the War Department of attempts of white men to dispossess non-reservation Indians along the Columbia River and other places within the Military Department of the Columbia of the land they have for years occupied and cultivated, and similar information having been received from other sources in reference to other localities where land is occupied by Indians who are making efforts to support themselves by their own labor, you are hereby instructed to peremptorily refuse all entries and filings attempted to be made by others than the Indian occupants upon lands in the possession of Indians who have made improvements of any value whatever thereon.

In order that the homes and improvements of such Indians may be protected, as intended by these instructions, you are directed to ascertain, by whatever means may be at your command, whether any lands in your district are occupied by Indian inhabitants, and the locality of their possession and improvements as near as may be, and to allow no entries of filings upon any such lands. When the fact of Indian occupancy is denied or doubtful, the proper investigation will be ordered prior to the allowance of adverse claims. Where lands are unsurveyed no appropriation will be allowed within the region of Indian settlements until the surveys have been made and the land occupied by Indians ascertained and defined.

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Circular approved October 27, 1887, 6 L.D. 341-42, by the Acting Secretary to the General Land Office Commissioner, Registers and Receivers, and United States Surveyors-general, quoted the May 31, 1884, circular completely and then stated:

The foregoing instructions apply to every land district and to all lands occupied by Indian inhabitants in any part of the public land States and Territories of the United States.

It has been officially represented that these instructions are disregarded, and that public land entries have been allowed upon lands on which Indian inhabitants have their homes and improvements, and in some cases where the Indians have so resided for a number of years, cultivating the soil, and making the land their permanent homes.

The allowance of such entries is a violation of the instructions of this Department, an act of inhumanity to defenseless people, and provocative of violence and disturbance.

You are enjoined and commanded to strictly obey and follow the instructions of the above circular and to permit no entries upon lands in the possession, occupation, and use of Indian inhabitants, or covered by their homes and improvements, and you will exercise every care and precaution to prevent the inadvertent allowance of any such entries. It is presumed that you know or can ascertain the localities of Indian possession and occupancy in your respective districts, and you will make it your duty to do so, and will avail yourselves of all information furnished you by officers of the Indian service.

Surveyors general will instruct their deputies to carefully and fully note all Indian occupations in their returns of surveys hereafter made or reported, and the same must be expressed upon the plats of survey.

For specific instructions concerning the Indian Homestead Act, see Circular of August 23, 1884, 3 L.D. 91. For instructions pertaining to Indian allotments outside reservations under section 4 of the General Allotment Act of 1887, 24 Stat. 388, 389 *as amended*, see Circular dated June 15, 1896, 22 L.D. 709, *as amended* by Circular of June 27, 1899, 28 L.D. 569.

Prior to the general instruction to surveyors to note all Indian occupancy in their survey returns given in the Circular of October 27, 1887, specific instructions had been issued by the Commissioner of the General Land Office to the Surveyor General of Utah to instruct his deputies to

* * * note the location and extent of improvements of non-reservation Indians falling within their field of operations, the same to be designated in their notes of survey and on the plats, in order that Registers and Receivers, may be enabled to conform to the requirements of the Circular of May 31, 1884. * * * (Nav. Ex 61-A.)

Similar instructions were given again in 1885 that "Lands in the occupation of Indians or native inhabitants will be carefully delineated." (Nav. Ex. 61-B.) Thereafter, similar instructions were incorporated into the general instructions for surveying the public lands. They were in effect at the time of the Page and Lentz Survey which surveyed the two school sections in question here.

Surveys of the Area

The State has relied on the absence in the survey records of any

reference to Navajo occupancy on these sections to support its contention that there was not occupancy of the sections at that time. The Tribe, however, contends that analysis of the entire history of the survey provides evidence of substantial Navajo occupation of the area.

It is evident that the survey contract No. 215, dated October 29, 1897 (Nav. Ex. 356), which included a survey of the town of Bluff, was extended to the areas in question without significant proof of settlers (Nav. Exs. 61-F-H). The fieldnotes of the Page and Lentz Survey for the subdivision and meander lines of T. 40 S., R. 24 E., conducted in February 1899, stated there were no settlers in the township.

* * * but at one time a small settlement was located at the mouth of Montezuma Wash extending through secs. 31 and 32, the ruins of old cabins mark the places at the time. The township would be considered good grazing at all seasons of the year. Numerous se[el]ps along the Montezuma Wash supply stock with water * * * (State Ex. 23).

The fieldnotes of the survey of subdivisions of T. 40 S., R. 26 E., also conducted during February 1899, indicated there were no settlers in the township. The township was described generally as fine grazing and range land (State Ex. 25).

In the other surveys made by Page and Lentz at this time, specific reference is made once to Navajo Indians in the fieldnotes of T. 43 S., R. 26 E., to the extent only of indicating that a trading post

there dealt with Ute and Navajo Indians (State Ex. 32). Two settlers were noted. Settlers were noted in T. 41 S., R. 25 E., where there was a trading post and post office at Holyoke, and Antes' mission and the McElmo settlement (State Ex. 28). These townships were on the north side of the river from the Navajo reservation and were included in the 1905 extension of the reservation. In T. 41 S., R. 24 E., the fieldnotes indicated there were several claims with buildings and fences along the San Juan River but the settlers had recently moved to Bluff and the town of Montezuma had been abandoned (State Ex. 28). Another abandoned settlement was noted in T. 42 S., R. 26 E., at River-view, Utah, which was located "during excitement over placer mining, but since abandoned," although two settlers remained in the township (State Ex. 31). Ancient ruins were noted in T. 40 S., R. 25 E., and the township was stated as fine grazing and range lands, but no settlers were noted (State Ex. 24).

The Tribe points to a field check of the Page and Lentz Survey by Edward Faison in 1899. Faison reported missing corners, corners inaccurately placed, etc., concluding that where the surveyors "had reason to believe that their work would be examined, it is splendid, at other places, it bears numerous evidences of gross carelessness" (Nav. Ex. 61-P). Page had accompanied Faison and attempted to justify the missing corners by stating they had been

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destroyed by Indians, as this was an area used by them for sheep range (Nav. Ex. 369). Faison denied Page's claim that "Ute and Navajo Indians" had destroyed them, as he had found corners in good condition "in the midst of their villages, close to their hogans, along well travelled trails and on the only public road running East and West through the contract, while in the most isolated sections no corners could be found" (Nav. Ex. 61-P). His remarks are not pinpointed to any specific township nor does he distinguish between Utes and Navajos. We note that the public road referred to, from Bluff to Cortez, Colorado, traversed the McElmo Creek section (see plat of T. 40 S., R. 26 E. (State Ex. 7)). Although Faison criticized the accuracy of the surveys as to the monumentation and running of certain lines, he made no criticism of any failure in the Page and Lentz Survey to note Indian occupants, although he had rechecked the area with their fieldnotes. Where and what he meant by "Indian villages" is not known.

Only improvements and cultivation were specifically noted in the Page and Lentz Surveys. Lands were noted as being good grazing and range lands, but no reference was made to grazing use either by the non-Indians or Indians. Whether or not this was because grazing use was considered insufficient occupancy to note is not known.

The inaccuracies in the monumentations and running of some of the survey lines takes away from the presumptive weight to be given to the surveys, but not to the extent the Tribe suggests as strongly showing Navajo occupancy where they were not questioned in that regard, and where references to Indians by Faison do not distinguish between Utes and Navajos or show where they were located. The deficiencies of monumentation, etc., noted by Faison were corrected prior to approval of the survey. We note that the Tribe's witness, Edward O. Plummer, in doing his archaeological work, reported he had found all the corners of the McElmo section but only two of the corners of the Montezuma Creek section (Tr. 508-9).

Fieldnotes of a survey executed by Miller and Thoma in 1912, of subdivisions of T. 39 S., R. 25 E., indicated there were no settlers in that township, but stated "Several Navajo Indians who live in T. 39 S., R. 24 E., have been grazing sheep and goats in the parks and on the mesas." (State Ex. 18.) The notes also stated there were no known white settlers in Ts. 36 to 38 S., Rs. 24 to 26 E., but "[t]here are several Ute Indians, living up Montezuma Canon about 12 miles from the road crossing with the Montezuma Canon, who graze sheep and goats in the canon and on ridges" *Id.* Other surveys by Miller and Thoma that year in the general area refer generally only to unspecified graz-

ing use but do not mention Indians.²¹

Later surveys in the area prior to 1933 generally mention grazing use, but no reference is made of Navajos, although one reference is made of Paiutes.²² These surveys tend to show there was substantial grazing use made throughout the Aneth area, but there are indications much of the grazing was by non-Indians.

The reference in 1912 to "several Navajo Indians" in State Ex. 18 is the strongest indication in all of the information concerning the surveys of Navajo occupancy in the area. That was within a township of the Montezuma Creek area, one town-

ship north of the Montezuma section. However, this does not establish that the Navajos were in the disputed section at that time or earlier.

Navajo Allotments in the Area

The Tribe contends that the records of allotments in the Montezuma Creek area provide conclusive evidence of Navajo settlement along Montezuma Creek before 1900. Only two of the allotment applications, however, in that area claimed occupancy prior to 1900. A third, that of Jim Joe, claimed occupancy prior to that time in secs. 11, 12, 14, T. 41 S., R. 20 E., an area west of the Montezuma Creek area and near Bluff. These applications were made in 1923 when the same allotting agent made allotments for the band of Utes and Paiutes in Allen Canyon. The application of a son of Burnt House Woman, Hosteen Oh Dee Teel (Dishface), then age 55, claimed occupancy for 35 years (1888) for grazing sheep and planting corn and gardens. He claimed rather substantial improvements on the SW $\frac{1}{4}$ sec. 2, T. 39 S., R. 24 E., of a 14 x 30 feet log house, 2 hogans 15 feet in diameter, a sheep corral and some cultivated land (Nav. Ex. 36A). He also asserted in his affidavit that he had built a log house 12 x 18 feet thirty-five years ago, at which time he had fenced most of the land. *Id.* The application of Sleepy Bitsee (Sleepy's daughter), age 40, claimed occupancy for 26 years (1897) for grazing sheep, and living on the land in the winter

²¹ The fieldnotes for T. 39 S., R. 26 E., noted the only improvements were of one settler who had a cabin and corrals, S. Brown, and stated the lands were used for grazing, but not by whom (State Ex. 19). In connection with T. 39 S., Rs. 21, 22, 23 E., fieldnotes mention grazing use, and prehistoric ruins, but no settlers (State Exs. 14-16). The fieldnotes of a survey relating to T. 38 S., R. 22 E., mention cultivation and a fence by a settler (State Ex. 9). There were no settlers mentioned in T. 38 S., R. 23 E., but a spring was noted as used by stockmen and freighters supplying good water for stock (State Ex. 10).

²² A retracement of the Utah-Colorado boundary line and of the subdivision of T. 38 S., R. 26 E., in 1915, reflected prehistoric ruins, no settlers, but a reservoir and rock cabin used by sheep herders in the winter (State Ex. 13). In surveys in 1919, fieldnotes pertaining to T. 38 S., R. 24 E., indicated two small stone buildings and a corral were used as winter quarters by a cattle company and the land was being used mostly for winter grazing, but not by whom (State Ex. 11); the fieldnotes pertaining to T. 38 S., R. 25 E., noted two settlements and also approximately 40 Paiute Indians in sections 30, 33-35, having small garden plots, wickiups or hogans in canyon bottoms (State Ex. 12). In 1928, a dependent resurvey of the north boundary of T. 41 S., R. 21 E., subdivisions and meanders, noted winter grazing of cattle and sheep, with the forage showing many years of overgrazing, no land suitable for farming, and no settlers (State Ex. 26).

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time. She listed the following improvements in the SE $\frac{1}{4}$ sec. 16, T. 39 S., R. 24 E., a hogan 18 feet in diameter, a hogan 15 feet in diameter, and a sheep corral 300 feet in diameter (Nav. Ex. 55A). The General Land Office status report indicated that the survey of the land was approved March 8, 1916. The State was notified of the allotment application as it was on a school section and of its right to protest allowance of the allotment, but did not do so. *Id.* The record is not clear as to whether patent ever issued for this allotment (see Nav. Ex. 55A and B).

Of the other eleven applications by adult Navajos for their own allotments, five showed occupancy beginning prior to 1910 and six showed occupancy beginning after that time.²³ A statement in the Director's decision that the only allotment in T. 40 S., R. 24 E., was to

Jelly [Jellie] in section 30 is corrected to show the allotments indicated in note 23 to the adult Navajos in that township. There were additional allotments to minor children.

The closest allotments to the disputed Montezuma Creek section are those of Asthanie Yashie in the E $\frac{1}{2}$ E $\frac{1}{2}$ sec. 17, adjoining that section, and of two for her minor children in the SE $\frac{1}{4}$ sec. 8 and the NE $\frac{1}{4}$ sec. 20, T. 40 S., R. 24 E., which corner the disputed section (see State Ex. 2). She was the daughter of Burnt House Woman and the mother of two of the witnesses for the Tribe, Joe and Tom Biletso (Tr. 163, 221, 224). Tocito Springs, about which much of the testimony of the Navajo witnesses pertains, is within her allotment close to the section 16 line (see Nav. Ex. 10-J-1).

As the Director's decision pointed out, it is significant that allotments

²³ The names of the allottees, their ages, claimed years of occupancy, location, type of use, and improvements are as follows:

1. Sleepy, age 55, 20 years (1903), N $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 25, T. 39 S., R. 24 E., several acres of cultivated land, some fences, and a hogan (Nav. Ex. 49).

2. Nagashi Bitoshie (Caroline Rentz), age 50, 20 years (1903) SW $\frac{1}{4}$ sec. 25, T. 39 S., R. 24 E., two acres corn cultivated, hogan and some fencing (Nav. Ex. 50).

3. Asthanie Yashie, age 52, 17 years (1906), E $\frac{1}{2}$ E $\frac{1}{2}$ sec. 17, T. 40 S., R. 24 E., a hogan and a wire corral, grazing sheep use (Nav. Ex. 44).

4. Whitehair, age 51, 15 years (1908), S $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 25, T. 39 S., R. 24 E., used land for grazing sheep and growing corn (Nav. Ex. 39).

5. Whitehorse, age 51 14 years (1909), SE $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 30, T. 40 S., R. 24 E., 14 years (1909), a log house 16x30, log stable, two hogans, five acres of gardens, fences and irrigation ditches used for garden and sheep raising (Nav. Ex. 47).

6. Jellie, age 46, 12 years (1911), S $\frac{1}{2}$ NE $\frac{1}{4}$ and N $\frac{1}{2}$ SE $\frac{1}{4}$ sec. 30, T. 40 S., R.

24 E., stone house 14x16, hogan 16 feet diameter, garden and sheep raising (Nav. Ex. 46).

7. Jane Begodie, age 45, 8 years (1915), SE $\frac{1}{4}$ sec. 26, T. 39 S., R. 24 E., hogan, sheep corral, well, used for grazing sheep (Nav. Ex. 52).

8. Natani Bega, age 40, 8 years (1915), NE $\frac{1}{4}$ sec. 26, T. 39 S., R. 24 E., 15 foot hogan, horse corral, used for grazing sheep and living (Nav. Ex. 45).

9. Mark T. Sone, age 32, two years (1921), SW $\frac{1}{4}$ sec. 24, T. 39 S., R. 24 E., 18 foot hogan, $\frac{1}{2}$ mile irrigation ditch, some cultivated land, some fencing, used for sheep grazing, planting corn (Nav. Ex. 34).

10. Laura Dechene, age 26, 2 years (1921), SE $\frac{1}{4}$ sec. 23, T. 39 S., R. 24 E., for grazing 200 sheep and goats, three acres cleared for cultivating next year.

11. Slim, age 23, 2 years (1921), E $\frac{1}{2}$ NW $\frac{1}{4}$ and lots 1 & 2, sec. 30, T. 40 S., R. 24 E., three acres corn and garden, $\frac{1}{4}$ mile of wire fence, $\frac{1}{4}$ mile of irrigation ditch, and summer hogan, used for garden.

made to descendants of Burnt House Woman, were not made of the disputed section, although as the allotment of Sleepy Bitsee indicates, State sections were selected, at least where occupancy was alleged prior to the vesting date of the State's title. It is also significant, that although the Tribe has claimed occupancy by Burnt House Women and her family around Tocito Springs prior to 1900, Asthanie Yashie who was 52 in 1923, only asserted occupancy of land including the springs which would begin in 1906 (see note 23 and Nav. Ex. 44).

Although some of the allotment applications listed only a grazing usage and a small garden area, others listed some enclosures and dwelling places. A witness for the State questioned whether some of the improvements at that time were as substantial as indicated in the applications and doubted there were other Navajo improvements in the area.

This witness, Neil F. Stull, was an employee of the General Land Office in 1923 and 1924 assigned to investigate the mineral character of the allotments. During that time he visited each of the allotments (Tr. 1130). In his mineral report, he stated that the area was "desolate and barren," that "the Indians have lived in the region for a great many years and have done some farming and sheep grazing" (State Ex. 1A). He testified, however, that this comment was not from his own knowledge but from what he had been told (Tr. 1150), and that he relied

on the statements of the allotting agent as to the adequacy of the settlement and occupancy requirements of the Indians (Tr. 1135-36). He also testified he saw only a few herd of sheep and goats tended by Indian women, no fences to any extent, and no buildings except about three hogans described as made out of native stone, circular, with a hole in the roof, and generally about 15 feet in diameter. He said they were fairly conspicuous (Tr. 1139, 1170). He also explained that as to the allotments selected for the minor children of the adult allottees there was no necessity to build any type of dwellings on those parcels (Tr. 1170-71). No improvements or other acts of settlement are required for allotments for minor children of qualified adult allottees who have maintained settlement on their allotment. *Rollandine Ruth Landergen*, A-29362 (July 17, 1963).

Stull also stated that at that time the area north of the line of the 1905 addition to the Navajo reservation in Utah was known as a Ute area (Tr. 1157). He testified also as to the presence of another cultural group in the area at that time whom he had seen in his travels through the San Juan County area, Basques, who were migratory sheep owners ranging sizable herds of sheep (Tr. 1132-33, 1160), but were later put out of business when the Taylor Grazing Act became effective. *Id.*

The allotment sites appear generally to be along the water sources and where there were springs. There

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is a strong indication that the lands selected were those deemed the best for farming potential (see also Tr. 677), which suggests an expectation of a more permanent settlement and development of the land by the Indians. The Director has indicated the fact allotments were made to descendants of a Navajo named Burnt House Woman (about whom much of the testimony concerning occupancy, especially, of the Montezuma section, revolves) but they did not select the Montezuma section, supports an inference that the section was not considered their permanent home. As the allotment of Sleepy Bitsee shows, school sections were selected, at least where occupancy was alleged prior to the vesting date of the State's title, and they were at least aware at that time of a means of acquiring title to land outside the reservation. Although the Tribe contends that other Navajos may not have been allotted either because they were away at that time or because the allotting agent did not have time to get to them, the overall testimony of the Navajo witnesses seems to indicate that despite their rather isolated life news concerning happenings in the area spread. Thus, some of the older Navajo witnesses testified as to their recollections of the surveyors in the area much prior to that time, while others heard of their being in the area. Thus it is realistic to assume, even recognizing the significant cultural differences between the Navajos and the non-Indians at that time, that other

Navajos would have heard of the allotments and if they had desired one, would have asked the officials to help them. In any event, the fact that only two of the 13 adult allottees claimed occupancy beginning before 1900, although all were 23 or older in 1923, tends to show there was more occupancy in the area after 1900.

Archaeological Sites

To establish Navajo occupancy of the two disputed sections and the general area around the sections, the Tribe presented some 346 site reports (found in Nav. Exs. 10-A-G) prepared by J. Lee Correll, an anthropologist employed as Director of Field Research for the Tribe (Tr. 1201), David Brugge, employed by the Tribe to do anthropological research (Tr. 1078), with assistance by Edward O. Plummer, head of the Tribe's Land Use and Survey Department (Tr. 491). As indicated by the Director, this team relied heavily upon Navajos who now live in the area to locate and identify the sites of Navajo occupancy. Because there was no timber found on the sites within the disputed sections and adjoining sections as shown on Nav. Exs. 10-J-1 and 10-J-2, which was susceptible to tree dating (Tr. 1275), they relied on the informants for establishing the date of the use of the site (Tr. 1222-27). Brugge testified that the physical remains shown on the sites were compatible with the information given by the informants (Tr. 1305-06), who were

all Navajo Indians (Tr. 1317). Correll described their *modus operandi* after locating a site and the information recorded (Tr. 1326-37). The site reports generally designated the location by landmarks, prominent features of the terrain, and survey and map information; described each structure or remnant, noting Navajo cultural distinctions; noted pottery, artifacts, trade materials, or other cultural associations which would reflect age and users; would give the informant's history of the use of the site and occupants; and usually included a photograph of the site.

Information concerning the sites and Navajo occupancy outside the disputed sections was presented to establish a pattern of Navajo occupancy north of the San Juan River prior to 1900 and thereafter. Site and other information of occupancy after that date was presented to show continuing occupancy. Many of the site reports where occupancy was alleged prior to 1900 showed no remaining usable structures, only remnants of structures, such as a few scattered pieces of wood or rocks, others showed no remnants whatsoever, reliance being solely upon the informant's statement as to past use.

The large majority of the sites are outside the disputed sections, with many of them being outside the present boundaries of the reservation to the north and west in Utah and north and east in Colorado. A substantial majority of the reports of the sites on or within sec-

tions adjoining the disputed sections, as shown located on Nav. Exs. 10-J-1 and 10-J-2, show dates of occupancy of various Navajos beginning after 1900, most after 1920.²⁴ This is true with respect to all the sites except a group located considerably north of the disputed area.

To refute the Tribe's evidence, a witness for the State, Dr. Floyd W. Sharrock, Assistant Research Professor in anthropology at the University of Utah testified as to his perusal of the Tribe's site reports and examination of the sites on the disputed sections and adjoining sections. Because the nature and extent of occupancy as reflected by improvements and use is of importance in this case, we shall describe the reports of the sites within the disputed section which indicate occupancy prior to 1900. They shall be referred to only by site number as they are all found within the Tribe's Exhibits 10A-G and arranged by site number. We shall also add some of Dr. Sharrock's comments concerning the sites.

Nav. Ex. 10-J-2 shows the location of the sites within the McElmo section and adjoining sections. Of the 17 sites within section 16, T. 40 S., R. 26 E., five indicate pre-1900 occupancy, one shows a question as to the age to 1907, and another

²⁴ The Tribe's exhibit No. 10-I is a tabulation of the sites summarizing various data from the site reports. We note for the record a substantial, but understandable, error on page 11 of this tabulation in listing sites numbered 135 through 150 as being within T. 40 S., R. 26 E., whereas the reports and Nav. Ex. 10-J-1 show the numbered sites within T. 40 S., R. 24 E.

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shows occupancy from 1901-09, the others show occupancy beginning after that time. Site 120 is a spring known as "Bubbling Spring" within section 16 and close to McElmo Creek. Although the site report indicates the spring was developed by Navajos of earlier times and gives a probable age of pre-1900, the other sites in the vicinity of the spring date after that time. Thus, sites 93, 96 and 97, in the same quarter of the disputed section, show structures and occupancy of a probable age of 1943 to present (then 1961), 1943 to 1958, and 1958, respectively. Another report of a site in the same subdivision of the section, Site No. 116, gave a probable age of 1908 with use to 1919, as a summer camp, no farming.

The report of Site No. 104, the only other site in that subdivision, gave a question as to the probable age to circa 1907. The report indicates that the site "was only a temporary homesite as they used only tents and had no definite stock corral." Although it indicates the site was occupied by Chii Yashi and his family before the flu epidemic (1918), it states they probably spent about a year at the site and then moved about three miles west. Their move would place them well outside the section. The report indicates remnants of two shelters and a sheep bedding area. Dr. Sharrock examined the site and stated that artifacts such as tin cans and glass, though not Navajo, could have been used by Navajos as well as others, but the lack of purple coloring in

the glass probably dates the site past 1915. From the site report itself, there is nothing to support any dating prior to that time.

Of the four other reports of sites within the McElmo section which give a probable age of pre-1900 or close to that date, one of these for Site No. 127, gives a probable age of circa 1901 to 1909. The site report lists three shelters. Photographs of the three shows no more than several rocks and a few wood fragments by a juniper tree.

For site 80, a probable age of 1890's to 1918 is reported with use by a couple who had no children, as one of their camps while grazing sheep in the area. The report describes a rock shelter hogan, with only base stones of the wall remaining, a sheep bedding area, and a lamb pen. Dr. Sharrock testified that the rock shelter was not a shelter hogan, as normally understood, the maximum possible height was never more than three to three and a half feet (Tr. 2094). He saw no charcoal remains or signs of fire use (Tr. 2095). He concluded that the descriptions were exaggerated and there was no evidence conclusively at the site to date it and nothing to show any permanent use (Tr. 2097).

For site No. 103, a probable age of circa 1880 to post 1900 was reported. The structures indicated were a hogan, although no remains of the structure exist, a sheep bedding area, a small draw with two lamb pens at the head of the draw, a windbreak and a shelter, with no

structural remains. Dr. Sharrock found only what could have been used as lamb pens. In one of them he found synthetic fibers among the rocks which would date it well into the 20th century. He found no evidence of fires, etc., to show any significant habitation and concluded at most "the site may have been a short-lived camp, more recent than the indicated probable age." (Tr. 2094.)

The next site, No. 3, was reported to have been built before 1898 as the hogan, sweathouse and corral area of Hosteen Sleepy. There are differences in the informants' reports: one indicated it was used only in the winters, but that Hosteen Sleepy moved around a lot and had hogans in other places; another indicated Sleepy's family resided at the site for three years, but he also ranged his livestock over a wide area; another indicated he moved to the southeast across the McElmo Creek after the flu epidemic in 1918. If the latter two statements taken together are true, the occupancy must have started well after 1900. The only remnants not destroyed by road and oil well construction are remnants of the sweathouse. Dr. Sharrock observed the sweathouse poles and stated they were in too good a state of preservation to substantiate the probable age indicated in the site report (Tr. 2099).

The last site within the McElmo section for which a pre-1900 date was given in the site report is site no. 111, described as a corraled mesa, five horse trails and a corral. The mesa is within the NW $\frac{1}{4}$ of

section 16 and the E $\frac{1}{2}$ of section 17, and was reported as used for pasturing horses by Navajos and also used by "Paintes and Utes" when travelling through the area with "permission of the Navajos."

Of some 21 sites within the Montezuma Creek section only four gave probable dates prior to 1900. Site report no. 145 gave a probable age of prior to 1881 to "?" It was reported to have been the residence of Hn. Yidi, husband of Blind Woman who was a daughter of Burnt House Woman, and also to contain a burial place of a Navajo. It reported there was a farm and a playhouse on the site. Dr. Sharrock doubted the evidence of the burial and stated that the farm land was part of the Montezuma Creek bottom, and suggested the site was on the wrong side of Montezuma Creek (if so, it would be within section 17) (Tr. 2078-79). He testified that there was no evidence that the site could be as old as 1881, instead, the evidence that could be dated suggested well into the Twentieth Century (Tr. 2081).

Site report no. 140 gave a probable age of prior to 1900 to circa 1926, used seasonally by Gray-Faced Woman, Kewooshi "Bunion," her son-in-law, and his wife and children, together with another site (141 in section 15). The family was reported to move about constantly with their large herd of livestock. The indicated structures were a hogan, with only some foundation remaining, two rock shelter corrals, one with a portion of an Anasazi wall. Dr. Sharrock doubted the date

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as he found no evidence of material which could date the site other than two rubber tires, dated around 1940, and he believed the rock structure remnants from their construction were of an Anasazi site rather than a Navajo site (Tr. 2129-34). Correll testified the rock shelters could have been used by Anasazis, but also by Navajos, and the masonry was Navajo (Tr. 1429-30).

Site 85, with a probable age of pre-and post-1900, was reported to have been the situs of Eddie Nakai's parents' forked-pole hogan, which had been completely obliterated by boulders from a broken stone ledge. There is now a pool dug by the oil company adjacent to the site and Montezuma Creek.

The most important sites are 19A and 19B, with an indicated probable age of late 19th century and post 1900. Nav. Ex. 10-J-1 shows 19A as two different locations, one within section 16 and one within section 17, both on the east side of Montezuma Creek. Site 19B is shown within section 16 on the west side of the hairpin turn of the Creek. Within site 19A, the report lists three hogans, with only remnants of one remaining, a one-room log house, with the lower part of a stone chimney remaining, three lamb pens, one sunshade (no remains due to road grading), one sweathouse (part of a rock pile, circular depression about five feet in diameter remaining), three corrals (with some remnants). Site 19B is described as a summer camp where sheep were sheared under two large

cottonwood trees. The sites were reportedly used by Burnt House Woman and her family,²⁵ except the log house was occupied by Joe Biletso's parents. His mother, Azni Yazzie "Short Woman," or As-thanie Yashie as listed on her allotment, was a daughter of Burnt House Woman.

In testifying concerning his examination of sites 19A and B, Dr. Sharrock commented also upon site 136, saying archaeologically the sites could not be separated (Tr. 2069). He suggested that certain structures reported in site 19 were also reported as within site 136, especially the lambing pens and corrals (Tr. 2072). A collapsed hogan site closer to site 19A than site 136, but reported in 136, had mill planks and other materials which he indicated would suggest a date after 1930 (Tr. 2073). The Tribe's site report 136 gave a probable age of prior to 1918 to 1947, occupied first by Todich'i'ii'nii Tsoh's wife's mother before the 1918 flu epidemic and then lived at by him, his wife and their nine children, and a son-in-law named Frank Johnson, but was abandoned in 1947 following

²⁵ At least five other sites were indicated as dwelling places of Burnt House Woman within the area of the Montezuma Creek section: site 128, SW $\frac{1}{4}$ sec. 22, dated as of 1915; site 192, SE $\frac{1}{4}$ sec. 16, dated 1918-22, but also unspecified prior use; site 130, SW $\frac{1}{4}$ sec. 15, circa 1912-13 and before; site 133, NE $\frac{1}{4}$ sec. 17, site occupied with Slim Todich'i'ii'nii, grandson-in-law of Burnt House Woman (she is reported here as dying about 1931 but see Big John's testimony which gives the time of her death about 1917 (Tr. 746-47)). Another site, no. 144, SW $\frac{1}{4}$ sec. 15, SE $\frac{1}{4}$ sec. 16, refers to farm land used by Burnt House Woman, no date given.

the death of one of the children and Joe Biletso's mother, nearby at site 148 (a windbreak, her burial site is indicated as site 81, also within the disputed section but closer to the section 9 line). The report lists three hogans (only the ring and a few remnants), a corral, four lamb pens, a house (rectangular ground plan, superstructure had been hauled away), a cache under a large sandstone boulder (a corn cob, one horse shoe, two back boards of a cradle board, and three heddle shafts (used for weaving)), and a storage bin (rock shelter three feet wide, 1½ feet deep and eight inches high).

Dr. Sharrock found other cultural material associations, including San Juan Anasazi pottery and chip stone, and historic materials such as pieces of broken glass, which were not Navajo in origin although they might have been used by Navajos (Tr. 2069). He stated that the remnants of hogan 7 listed in site report 19A as within section 16, are actually in section 17, which could readily be assured because the section marker is in the immediate vicinity (Tr. 2069-72). He doubted that the two large cottonwood trees described in site 19B were "noteworthy trees 60 or 70 years ago" as cottonwood trees grow quite fast and are short-lived (Tr. 2075). He questioned whether the water from Montezuma Creek could have gotten up over the area where Burnt House Woman's hogan was reported to have been or would have washed away all evidence of her occupancy as there were Anasazi pottery and

cans and glass on the surface of the area (Tr. 2159). He found considerable evidence that the Anasazi once dwelt in the area (Tr. 2073). Essentially there were no remains which he could identify as distinctively Navajo within site 19 (Tr. 2074). There was some glass which was turning purple which would date it prior to 1915. *Id.* Both the glass and the Anasazi pottery were on the surface, but he stated there was nothing to indicate the Navajos were responsible for the purple glass being there or for the beer cans which were also there (Tr. 2075).

Generally, Dr. Sharrock testified that the data from the sites he had examined which were reported as turn of the century or earlier "actually refute in most instances, or certainly do not support the contention of that age description" (Tr. 2154). Of the two disputed sections, he testified, "[t]here were no remains predating 1910 and I think 1910 may be a little early there" (Tr. 2155). His opinion that there was not Navajo occupancy prior to 1910 did not pertain to the whole area north of the San Juan River but only as to the two areas of the disputed sections (Tr. 2160).

Even if we were to ignore Dr. Sharrock's characterizations of the sites on the disputed sections, it is apparent from a reading of the site reports pertaining to those sections that there are no physical remains which, by themselves, could be identified and dated as establishing Navajo occupancy prior to and during 1900. Reliance must be, therefore,

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completely upon the informants to date the sites at that time and, in most cases, to show the existence of any structures whatsoever. As the site reports show on their face, some of the hearsay reports of the informants were contradictory as to dates and location of occupancy, and some would support contrary inferences or conclusions from those which the Tribe draws. For example, with the exception of sites 19A and B, informant statements in other site reports tend to show occupancy by Burnt House Woman in the area after 1900, rather than before; at least, they show her removal from sites 19A and B, as dwelling places thereafter (see note 25).

Some of the Navajo informants identified on the site reports testified at the hearing. Therefore, the hearsay informant statements reflected in the site reports have been evaluated with their testimony and that of the other witnesses and other evidence at the hearing.

*Testimony of Elderly Navajos,
Utes, and Non-Indians of the
Area*

As the Director pointed out, there are irreconcilable differences in the testimony of the Navajo witnesses for the Tribe and the Ute witnesses for the State. This is especially true with respect to their broad generalizations, respectively, that Utes did not live in the area, or that Navajos did not live in the area. When queried more specifically, most witnesses from each Tribe could remember or identify members of the

other Tribe within the area, although they would not acknowledge that they "lived" there, at least prior to the 1933 extension of the Navajo reservation to include the area in conflict. The record reflects historical traditions of conflicts between the two groups and cultural differences which might well reflect upon their recollections of observations of peoples and places many decades previously.

There was some conflict in the testimony of the Tribe's witnesses as to the archaeological sites and Dr. Sharrock concerning the reliability of using informants of a particular culture group in doing archaeological research and as to their opinions concerning Navajo occupancy of the area. Dr. Sharrock's comments concerning the use of informants has some bearing upon the difficulties in this case of evaluating the testimony of all of the witnesses, including the non-Indians, who testified as to their observations of the area, the family, group or tribal traditions relating to the use and occupancy of the area by various people, and may explain some of the contradictions. The Director has quoted Dr. Sharrock's comments suggesting that the Navajo informants' statements were more reliable as to more recent occupation and use, but not reliable as to older events. In addition to the factors of age of witnesses and time span in relation to the events recalled, which affect the reliability of informant information, he indicated that informants from a particular cultural

group may not be objective about their own group. He explained this in terms of the general anthropological concept of ethnocentrism—that a person may be least able to understand one's own culture and evaluate its importance because he is "so tied up in it" that he "can't look at it really objectively, only subjectively" (Tr. 2068). Thus, he stated that anthropologists normally study cultures other than their own because they can go and view the other objectively, but as soon as they begin "to feel a real affinity with the group they are studying, then it's time for them to get out". *Id.*

It is evident that much of the testimony of the witnesses is ethnocentric and that to some extent this tends to explain the obvious blotting out of any significance to the existence of another cultural group. This is particularly illustrated in the discrepancies in testimony between the Navajo and the Ute witnesses as to the existence of the other group in the area. The Navajos attached extreme importance and individual and group status to the ownership of sizable herds and flocks of livestock, especially sheep and horses (this is evident from the testimony of the witnesses but is particularly reflected in the portion of the transcript of *Hatahley v. United States*, *supra*, note 7, submitted as Nav. Ex. 59). Although some Utes had herds and flocks, the records show that many Utes who travelled through the area, subsisted, other than by aid primarily

from non-Indians, by hunting game and by gathering wild fruits, berries and edible plant roots. This type of subsistence and the Utes' lack of obvious wealth in Navajo terms of owning livestock degraded the Utes' importance to the Navajos as is reflected in much of the Navajo testimony concerning them.

The Tribe has contended that the testimony of the Utes is so ephemeral that the Utes seem to be an historical apparition, now appearing and then vanishing without leaving a trace, pointing to testimony by a Ute that he had "never stayed in any place more than one month." (Tr. 1578). However, this characterization would also apply to the Navajos. For example, a Navajo witness, a daughter of Burnt House Woman, also indicated that Burnt House Woman would move around with her sheep and wouldn't spend one month in the same place (Tr. 329). In addition to the fact the Navajos were usually wealthier than the Utes in terms of ownership of livestock, they would often build more substantial structures for their camps which would leave more tangible physical remnants than those of the Utes. Thus, some of their hogans were primarily built of stone or had stone foundations for wooden and mud and brush hogans and sweathouses; whereas, the Utes usually used tents or would make less substantial shelters out of brush, probably comparable to some of the windbreak shelters designated in the Navajo site reports as places of Navajo occupancy. One

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Navajo witness described the Utes passing through the Tocito Springs area, who "used to arrange branches in a circle and live in them for a while" and then move on (Tr. 401). Utes testified they used the spring, calling it Sandy Spring (*see e.g.*, Tr. 1752, 1867).

Although there are varying types of Navajo hogans depending on the type of construction material at hand, certain characteristics, such as their circular shape, location of the door to the east, hole in the roof, etc., appear consistent in the evidence. There are, however, differences in the record concerning where the Navajos would locate their hogans and the extent of the time they would spend at the hogan site. For example, the Director's decision quotes from a report entitled "Navajo Houses" contained in the Seventeenth Annual Report of the Bureau of American Ethnology, dated 1895-96 (Nav. Ex. 68), that a hogan would usually be hidden away but near a good fuel supply and not too far from water, although seldom close to a spring.²⁶

²⁶ Of some similarity to this report is a statement by a special agent who investigated difficulties between Indians and non-Indians in the San Juan area of New Mexico (Nav. Ex. 239). Although his comments do not pertain to Utah, his statement casts some light on the life style of the Navajos at that time (Nav. Ex. 237):

"I find that the chief cause of the trouble in the San Juan Country is from the fact that the Indians do not build proper houses upon their lands. Instead of building a cabin or a house fit for permanent residence, the Navajos build "hogans" which consist of a slight excavation in the earth, a rude unplastered and un-mortared stone wall about six feet high covered with a brush roof shingled with clay and containing but a single room. They locate these "hogans" at a

At the turn of the century and later, hogans were not necessarily built upon the small areas of land that were farmed along the San Juan River and tributary creeks.²⁷ When they were built, they were of a transitory nature as were their farm lands. As late as 1912, in a report on Navajo farming conditions along the San Juan River in New Mexico and Utah, the farmer employed by the Navajo Agency at Shiprock reported it had been impracticable to induce the Indians to build permanent homes and improve the land with permanent irrigation ditches because of the treacherous nature of the river. Crops would be planted at various places at various times, their success depending upon the adequacy of the water (Nav. Ex. 547). He stated:

Very few permanent farms have been established in the latter sections referred to. I have known Indians to go thirty miles to plant their crops, and then go back again each time they needed cultivating. It is seldom that the Navajo stock and crops are to be found in the same locality. Their sheep and their camps are usually found where the best grass grows. Their horses and cattle may be twenty or thirty miles away, while their crops may be planted several miles in a different direction. *Id.*

distance from water and from their farms, as a rule. When the grass becomes scarce near their "hogans" they drive their herds further up into the mountains or else to a great distance and it may be months before they return to their "hogans." In the meantime, a white man has settled on their farms and fenced in their spring. The Indians claim the land and the right to the water and the white settler relies on his occupation & settlement. This, of course, breeds controversy."

²⁷ See note 26, *supra*.

Some of the testimony of the elderly Navajos would place the hogan sites nearer to water sources. Their testimony, as well as other evidence in the record, establishes the transitory nature of the use of their hogans and of their farming. Farming was done on different sites at different times. For example, Mrs. Susie Jim Hatahley, a daughter of Burnt House Woman, testified that Burnt House Woman raised corn where the new bridge crosses Montezuma Creek in the SW $\frac{1}{4}$ of the Montezuma Creek disputed section, but also that she raised corn "down to the San Juan River" (Tr. 332-33). Another witness, Little Wagon, reported Burnt House Woman shared a field in the Coreso mountain area with his father (Tr. 202-03). This was probably prior to 1900 and south of the San Juan River, as that witness testified he moved to the confluence of Montezuma Creek and the San Juan 67 years previously (1899) after moving from the Coreso (Carissa?) mountain area (Tr. 196, 202). Mrs. Hatahley also testified her mother herded sheep from the San Juan River towards Bluff, up to Blanding and near Monticello where they moved for the winter. She added, "[a]t the time there was no Navajos owning sheep close by. It is not like the present time where there is a lot of people living close together." (Tr. 328.) She described Burnt House Woman's home at Tocito Springs as a regular round hogan made out of poles (Tr. 330). In response to a question as to how

long the hogan would stand, she stated:

Well, it was this way. They would dismantle those hogans and move it to another place. They didn't just leave it stand at one place and let it stand like that. They would periodically dismantle it and move it again. It didn't remain setting there like they do with the houses * * *. *Id.*

The Director has quoted her further statement to the effect that in those days the Navajos would simply bundle up everything they had, place it on a horse, and move to another place (Tr. 331).

The transitory character of the occupancy is also reflected in the testimony of most of the other witnesses for the Tribe, including that of Slim Todachiini, whose testimony the Tribe relies upon as establishing that his family were in the area of the disputed Montezuma Creek section prior to 1900. He testified that his parents raised melons, cantalope and corn on Montezuma Creek and had some livestock which grazed within a 3-mile radius from Tocito Springs (Tr. 295-96). However, his testimony further indicates that after the one summer after his birth at "Edge of Red Cliffs" south of the San Juan River (Tr. 310), his family moved to another place south of the river (Tr. 311). The evidence is not clear when his family moved further north. Although he said he saw Burnt House Woman only once, he stated she had a farm and home by the new bridge (Tr. 299), but when asked just where she lived he stated "[S]he didn't live in just one place" and described her

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herding her sheep in different places and not staying in just one place (Tr. 297).

Although the Tribe has contended, in effect, that the Tocito Springs area was the permanent base camp of Burnt House Woman and some others, the evidence does not support the conclusion that either of the disputed sections was the primary site used by any of the Navajos prior to 1900 or thereafter. This has been explained in part by the Director reflecting upon the Navajos' testimony concerning their "homes" and that it might be consistent with their logic to have many areas considered as their homes at the same time.

There is some testimony which might be read as indicating that the area of Tocito Springs may have been a winter camp for Burnt House Woman (Tr. 298). However, most of the testimony including that of Burnt House Woman's descendants, and other evidence in the record tends to show that Navajos wintered in other areas when they were outside the reservation where there would be firewood and shelter, and the immediate areas of the San Juan River and Montezuma and McElmo Creeks were primarily summer use areas where some farming could be done when conditions were favorable in the creek bottom lands and where water was available (*e.g.*, Tr. 161, 215-16, 333, 369-71, 393-94, 433, 474-76, 661, 701, 730, 871-72). One non-Indian witness for the Tribe, Ira Hatch, a long-time resident in the area, de-

scribed his observations relating from 1912. He stated that in the winter the Navajos lived at permanent camps with some permanent dwellings from which they did not move (1029, 1054), but in the summer they would go where there was forage for their stock and had only temporary hogans. *Id.* However, one of the Navajo witnesses stated they had the same kind of houses at winter camps as at summer camps (Tr. 394).

With respect to specific occupancy of the McElmo Creek section, the Tribe has emphasized testimony by Jim Harvey, Robert Lansing, Jack Adiai Neez, Susie Lee and John Rockwell, all older Navajo witnesses. Analysis of their testimony and the other witnesses, however, at best shows transitory grazing use of the general area with use of the water sources in the McElmo section. Nothing can be precisely pinpointed to show tangible occupancy of the disputed section prior to 1900.

As to both sections the Director has discussed some of the specific testimony of the Tribe's witnesses in some detail. We need only add further that many of the direct statements of the witnesses concerning the occupancy by a given Navajo at the turn of the century were based solely upon family, clan, or tribal tradition as most of the witnesses then alive were only small children in the early 1900's. Some of them did not see the particular Navajo discussed, but indicated he or she had lived in a stated area,

presumably because of what others had told them. Other witnesses indicated they saw a given occupant only once or twice. Details as to when and where specific Navajos lived in a stated area are sometimes contradicting. The most specific testimony establishes that the occupancy of any given definite area was transitory. Much of the testimony is simply cumulative and general to the effect that Navajos lived north of the San Juan River between the Montezuma and McElmo Creeks and that other people did not live there. However, some of the specific testimony did indicate the presence of non-Navajos. See, *e.g.*, that of Ben Whitehorse which showed in 1920's that a white man in the area grazed his herds upon the Montezuma Creek section as well as the Indians (Tr. 375-78), and see *e.g.*, that of other witnesses that Utes came through the area (Tr. 400-01, 405, 548, 583, 733, 772).

Among the elderly non-Indian residents of the area who testified, there were some conflicts as to the extent and exclusiveness of the Navajo occupancy in the area. Ira Hatch, a trader with the Navajos, testified for the Tribe that the Navajos were the only Tribe occupying the area between the Montezuma and McElmo Creeks north of the San Juan River and south of Hatch Trading Post (Tr. 1034). This is denied by the State's witnesses generally. Hatch estimated the total group farms at Montezuma Creek in 1912 or later to be no more than 50 to 100 acres (Tr. 1043).

That some of the area was used by non-Indian stockmen from Utah and from Colorado was indicated by Charles Redd (Tr. 2006-23). Other witnesses for the State indicated there were only a few Navajos in the area, mostly along the San Juan River, but they believed the Navajos probably did not occupy the disputed sections in 1900 or for some time thereafter, *e.g.*, Albert R. Lyman (Tr. 1805); Eleanor Ismay (Tr. 1826-30); John Ray Hunt, Jr. (Tr. 1861); J. Monroe Redd, Jr. (Tr. 1942-43, 1957). The Tribe discounts the testimony of these and other witnesses for the State contending they had insufficient opportunity to observe the Navajos in the area.

As with the Navajo witnesses, it is apparent that some of the testimony and opinions of these witnesses to the effect that the Navajos were not the significant group in the area at the turn of the century was based upon their own family and cultural group tradition, history, and stories pertaining to the area, as well as their own observations personally. Some, such as Mrs. Ismay, of the Ismay Trading Post who was raised near the McElmo section as a child and has lived nearby all her life, since the 1920's trading primarily with Utes until more recently with the Navajos, had good opportunities to observe the area, especially the McElmo area. Her comments to the effect that Utes were a more predominant presence in that area than the Navajos in her childhood are per-

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suasive when considered with all the other evidence in the record which points to that conclusion as to the McElmo section. The Director's characterization of the Navajos having fixed abodes is somewhat generous in view of the evidence which shows there was little permanence to the Navajos' occupancy of any site at the turn of the century and one Navajo could have many different sites for his winter and summer camps, and would move as needed with his flocks of sheep.

With respect to a contention that the Tribe or individual Indians, abandoned the sections, the Tribe has implied the Navajo occupancy in the area was thwarted at times by wrong deeds of the non-Indians in the area, attempting to bring this case within the ambit of *Ma-Gee-See v. Johnson*, 30 L.D. 125 (1900), where a non-Indian homesteader by gun point, followed by the arrest of the Indian, dispossessed an Indian from his substantial improvements of a farm house, barn, garden, etc. The Indian immediately filed an allotment application and contested the homestead. There is simply no evidence in this case comparable to that. The evidence does not persuasively establish that any Navajo occupying either of the disputed sections was dispossessed from a hogan or farm lands by threats of physical harm.

Prior to 1900, the documentary history we have discussed and some testimony of the witnesses suggest more conflict between the Utes and Paiutes and the Navajos than be-

tween the non-Indians and the Navajos (see, e.g., Tr. 772). Except for the incident at Mitchell's ranch (see note 8), there is no evidence of a non-Indian killing a Navajo in Utah, whereas there is evidence of Navajos killing a few non-Indians (see notes 8, 9, also Nav. Exs, 178, 180, 187). The United States engaged in several small military operations in the area when complaints were made by the citizens of the area that Navajos or Utes or Paiutes were committing depredations. These cannot be likened to the *Ma-Gee-See* situation nor were any of the incidents shown as relating to the disputed sections.

Aside from the United States Government's conducted military operations in the area, the strongest suggestion of any possible actual force being used prior to 1900 is a statement by Albert Lyman that the cowpunchers for the large cattle companies from Texas and elsewhere who operated in San Juan County, Utah, in the 1870's might have fought the Indians, but he stated the settlers in Bluff and Blanding who came into the area after 1880 would not have done so (Deposition 40). He did say, however, that he and other cattlemen would have been disturbed to see the Navajo sheep north of the river because of the lack of forage (Dep. 18). He also indicated that the Navajos understood they were to stay on the south side of the San Juan River, as he saw a man tell a Navajo with her sheep on the north side, "tonaiij," meaning to go to the

other side, and the Navajo would move her sheep back across the river (Dep. 14). It is evident that the non-Indians living in the area considered the area north of the San Juan River as public land which they were entitled to graze, while at that time they believed the Navajos were entitled to use only their own lands in the reservation south of the river for grazing, which the non-Indians could not use.

As to post-1900 events there is an indication that one non-Indian, a Jack Majors, in the 1920's or 1930's may have threatened the Navajos and they were fearful of him, although nothing supports some of the Navajos' exaggerated statements concerning him (e.g., Tr. 604). By the 1920's as has been indicated, the pressures for use of the federal range had increased by an influx of settlers in the area to the north, expansion of existing cattle operations by non-Indians, and the increase of the Navajos and their flocks of sheep in the area. These pressures led to the expansion of the reservation in 1933 and may have been the focus of some troubles among the conflicting land users. There is some indication that in 1931 or 1932, four Navajo hogans may have been destroyed and poles used by homesteaders north of the area, and some Indian horses killed (Nav. Ex. 616), which had caused bitter feelings between the Indians and non-Indians, but nothing to show any improvements on the disputed sections were destroyed. Other indications by Navajo witnesses of threats

of violence appear to be exaggerated and to stem from the incidents resulting in the Supreme Court decision in *Hatahley v. United States*, *supra* (note 7), which occurred well after the passage of the Taylor Grazing Act in 1934, on lands outside the 1933 extension. The actions in killing Navajo horses for trespassing were taken by employees of the United States Grazing Office (now Bureau of Land Management), in enforcing that Act.

As to tribal abandonment of an area so that grants to third parties take effect without any encumbrance of Indian occupancy, see *Gonzales v. French*, 164 U.S. 338 (1896); *Williams v. Chicago*, 242 U.S. 434 (1917); *Shore v. Shell Petroleum Corp.*, 60 F.2d 1 (10th Cir. 1932), *cert. den.*, 287 U.S. 656.

Standing of Navajo Tribe to Contest or Protest Issuance of Patent to the State

With this factual background, we come to a resolution of the legal issues raised in this case. First, we consider the Director's holding that the Tribe is not the proper party in interest to protest the State's application for the confirmatory patent, and that the Tribe lacks standing because the same occupancy rights in individual Indians which would be sufficient to preclude the vesting of the State's title would, in effect, bar the land from operation of the Act of March 1, 1933, adding "vacant, unreserved, and undisposed of public lands" to the reservation, and section 1(d) of the Act of Septem-

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ber 2, 1958, which excepted "valid existing rights" from the declaration of title in trust for the Tribe. The Director stated the Tribe cannot claim title to these school sections for itself by alleging the individual Indian occupancy to defeat the State's title and ignore the effect of that occupancy on its own claim.

It is unnecessary to discuss the contentions of the Tribe and the State on this question to any extent. We have previously indicated that in this appeal the Tribe has taken an additional position that there were tribal rights created by the Utah Enabling Act and tribal occupancy which precluded the grant to the State. This position eliminates its complete reliance on any rights of individual Indians via the doctrine of *Cramer v. United States*, *supra*.

In any event, if the Director meant the lack of standing in the Tribe to be a jurisdictional defect by which this Department could not entertain its protest, his decision is in error to that extent. We distinguish between the right of the Tribe to have its protest heard and fully considered in this Department and any ruling on the merits of its protest insofar as it asserts title never passed to the State. As we have indicated, by the Act of June 21, 1934, 43 U.S.C. § 871a (1970), the Secretary of the Interior has a duty to ascertain when title to the numbered school sections vested in the State and any prior conditions, limitations, easements, or rights, if any. In 1965 when the Solicitor ordered

a hearing on the Tribe's protest, the rules of practice of this Department provided for private contest proceedings where "any person claimed title to or an interest in land adverse to any other person claiming title to or an interest in such land," or if the elements of a contest were not present, any objection raised to proposed action by the Bureau of Land Management would be deemed a protest and such action would be taken as deemed appropriate in the circumstances, 43 CFR 1852.1-1 and 1-2 (1965). The same rules, renumbered, prevail today, 43 CFR 4.450-1 and 2. The Tribe and the State are considered "persons" within the meaning of these rules. *Of* 43 CFR 1.3 & 2; *Sims v. United States*, 359 U.S. 108, 112 (1959).

In remanding this case for a hearing, the Solicitor deemed a full hearing on the facts to be appropriate. Full consideration of the appeal from the Director's decision is also appropriate. It is a fact that the disputed sections are now within the exterior boundaries of the Tribe's reservation. It is also a fact that substantial mineral values in the disputed sections are involved, as well as any other incidental values for the land, which the Tribe has a claim to if the State's claim of title is not sustained.²⁸

Therefore, despite any assertions that the Tribe may not have the

²⁸ By the Act of November 20, 1963, 77 Stat. 337, Congress approved a compromise and settlement agreement pertaining to the oil and gas rights in these two sections pending a determination of the disputed title claims between the Tribe and the State, which the Act otherwise did not purport to affect.

best claim to the land because of possible superior claims by individual Indians, it has a substantial interest in asserting in its own right or in behalf of its members (*but of. Sioux Tribe of Indians v. United States*, 89 Ct. Cl. 31 (1939)) a claim to the land and a challenge to the State's right to the confirmatory patent. This is not comparable to cases involving standing in court proceedings where actual injury to an organization or other legal entity cannot be shown. *Cf. Sierra Club v. Morton*, 405 U.S. 727 (1972).

Furthermore, it has long been recognized that whether or not in a particular case the United States has the technical status of a guardian or a fiduciary toward an Indian tribe, it does have a special relationship toward such tribe greater than that of a nonparticipating bystander, a sovereign toward its ordinary citizens, or a landowner toward his tenant. *Oneida Tribe v. United States*, 165 Ct. Cl. 487 (1964), *cert. den.* 379 U.S. 946, *cited in Navajo Tribe of Indians v. United States*, 176 Ct. Cl. 502, 364 F.2d 320, 322 (1966). As this proceeding raises the issue of title to lands within the exterior boundaries of the Navajo reservation, in addition to the duty required under the Act of June 21, 1934, regarding the State's confirmatory patent, this Department has a further duty in view of its special relationship to Indians to assure that the Tribe's claim is fully heard and considered. Therefore, whether this proceeding is deemed a private contest or a pro-

test within the rules of practice of this Department, the Navajo Tribe has been given standing within the Department to challenge the issuance of the confirmatory patent to the State for school sections within the exterior boundaries of the reservation in its own right and for its members regardless of any possible conflicting claims by its members or others.²⁹

Because no claims were asserted by any individual Indians in their own behalf as superior to the State and the Tribe following publication of the State's application for patent, it would appear there are no such claimants now entitled to challenge issuance of the patent to the State nor does the evidence reveal any. We, therefore, raise only a *quaere* as to whether the dictum in the Director's decision was correct in concluding that individual Navajo Indians might have standing to protest the State's application based upon their own occupancy claims, but it is premature to decide this theoretical issue.³⁰

²⁹ But compare the Act of March 2, 1901, 43 U.S.C. § 868 (1970).

³⁰ We note that support for the position that individual Navajos who were not descendants of Navajos bound by the 1868 Treaty and who may have occupied that area may still have aboriginal occupancy rights, as suggested in *United States v. Hosteen Tse-Kesi*, *supra*, note 7, is now questionable in view of the subsequent decisions in *Healing v. Jones*, *supra*, and *United States v. Kabineto*, *supra*. Any rights of individual Indians in the area as superior to the Tribe, aside from allotted lands, is also questionable in view of the recent *per curiam* order of the Supreme Court in *United States v. Jim, Utah v. Jim*, 409 U.S. 80 (1972), by which the Court rules that the 1933 Aneth extension Act did not create constitutionally protected property rights in the individual Indians, but gave rights to the Tribe, and that a subsequent

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The Director's decision is modified by striking the ruling concerning the standing issue as a ground for dismissal of the Tribe's complaint or protest against the State's patent application, and by modifying the findings and conclusions to conform with our ruling on this issue.

General Findings As to Individual and Tribal Navajo Occupancy

In addition to his ruling on the Tribe's standing, which may well have simply been a further ruling on the merits of the case rather than on the right to appear before the Department, the Director made findings and conclusions on the merits of the Tribe's protest. In considering standards set forth in court decisions, he specifically found there was not occupancy of the disputed sections by Navajos, both in terms of individual Navajos and in terms of Navajo tribal occupancy, sufficient to establish possession and to preclude the State's grant.

As to the individual occupancy, the Director hypothesized that even assuming an extension of the *Cramer* ruling in the light of the mode of life of the Navajos with

the Indians openly asserting dominion over the area encompassing the disputed sections to the exclusion of others, the facts in this case would not support this theoretical situation. He specifically found:

(1) the individual occupancy on these sections did not begin until after May 1, 1900;

(2) the area of occupancy judged with respect to the mode of life of the Navajo was vague and indeterminate; and

(3) the Navajo occupancy was not exclusive nor was dominion asserted.

As to tribal occupancy he cited the standard discussed in *United States v. Santa Fe R.R.*, *supra*, regarding tribal aboriginal occupancy, as to definable territory occupied exclusively by the tribe (as distinguished from land wandered over by many tribes), and concluded that there was not sufficient tribal occupancy here, that at most prior to the 1920's the land was only a

* * * no-man's-land used and shared by white stockmen and traders, a few bands of renegade Utes fleeing from the confinement of their Colorado reservations and some Navajo families seeking pasturage for their livestock.

We believe these findings are correct.

In considering the Tribe's contentions, it must be kept in mind that there was no withdrawal of the immediate area embracing these sections for the benefit of the Navajos in 1900. The 1905 executive orders added a small area north of the San Juan River in Utah near the disputed sections, but it was not until the lands were withdrawn in 1932 in aid of the legislation which be-

Act in 1968, 82 Stat. 121, could broaden the class of beneficiaries under the 1933 Act as to distribution of benefits from mineral royalties. The Court noted that the legislative history of the 1968 Act, specifically, S. REP. NO. 710, 90th Cong., 1st Sess. 2 (1967), reported a difficulty in determining Navajo residents in the Aneth extension, beneficiaries to the fund created by the 1933 Act, since "many Navajo families do not live permanently within the lands set aside in 1933 but moved back and forth between this area and other locations."

came the 1933 Act that the area encompassing the disputed sections was set aside for the Navajos and other Indians. This was nearly a third of a century after the time the State's title presumably vested.

Effect of Indian Occupancy and the Utah Enabling Act

Likewise, neither then, nor thereafter, were there any applications filed under the Indian Homestead Act, the General Allotment Act, or any other statute by which property rights could be acquired from the United States. Therefore, aside from the 1933 and 1958 statutes, which were long after the determinative 1900 date, the only statute upon which the Tribe makes any claim of right under as of 1900 is the disclaimer provision in the Utah Enabling Act as to lands "owned or held by any Indian or Indian tribes." The basic thrust of its supplemental and reply briefs in this appeal relies upon this provision as divesting the State of any right to these sections because of Navajo occupancy of the land. In addition to this statute, the Tribe primarily relies upon a general policy to protect occupancy rights of Indians. It contends that this policy must be recognized here and related to the type of lifestyle, the habits, modes and customs of the Navajos as distinguished from Indians in other parts of the country, such as those in *Cramer* and *Schumacher*, and should also be distinguished from standards applicable to occupancy and settlements by white men.

The Tribe amalgamates statements in the court cases regarding individual occupancy rights and tribal aboriginal rights into an additional protected tribal occupancy right which it contends flows from the Utah Enabling Act and court cases pertaining to occupancy rights of Alaska Natives. The amalgamation of undifferentiated concepts and principles from cases with different factual circumstances are fused together under the broad policy of the United States to protect occupancy rights of Indians and a broad rule of statutory construction to construe legislation liberally in favor of the Indians.

a. Statutory Construction Principles

The Tribe's contentions in this appeal relate primarily to the effect of the Utah Enabling Act. It contends, in effect, that the words "owned or held by any Indian or Indian tribes" and "otherwise disposed of" must be construed liberally to benefit Indians. It is unquestioned that courts have often recognized a statutory rule of construction to favor Indians in case of doubt as to the meaning of words in treaties or legislation in their behalf. *Squire v. Capogemon*, 351 U.S. 1 (1956); and see cases cited in *Assiniboine & Sioux Tribes v. Nordwick*, 378 F.2d 426 (9th Cir. 1967), cert. den. 389 U.S. 1046. However, the weight due to a rule of statutory construction is but one input into the interpretational equation. The rule of statutory construction in

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favor of Indians is not sufficient to entitle the Indians here to dispositive deference. As *Assiniboine & Sioux Tribes* shows, the rule is not inflexible and must give way to other rules of construction where warranted by the circumstances of the case.

United States v. First National Bank, 234 U.S. 245, 259, 262 (1914), would limit the rule of statutory construction in favor of Indians only to treaties or legislation where the consent of the Indians is involved, emphasizing that where legislation contemplated the rights of others and intended to enlarge the right to acquire as well as to part with lands held in trust for the Indians, the Court would not supply words which Congress omitted "out of any consideration of public policy or desire to promote justice, if such would be the effect in dealing with dependent people." Even where consent of Indians is at issue, the Supreme Court in discussing the rule has suggested it meant no more than that a treaty with Indians would be construed in accordance with the tenor and intent of the parties to the treaty, stopping short of "varying its terms to meet alleged injustices," leaving matters of such "generosity" to Congress. *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 353 (1945). As to whether a jurisdictional act to entertain claims of a specific tribe included lands which had been ceded by the Indians and sold and patented to settlers, the Court considered earlier legislation, administrative acts, and

all the circumstances leading to the passage of the Act to interpret the Act. *United States v. Creek Nation*, 295 U.S. 103, 108 (1935).

The Utah Enabling Act was not simply an Act pertaining to Indians, but was an Act to permit a territory to become a state, to provide the conditions whereby the people of the territory could establish their own government which would be transferred from the federal territorial control to the new state, and other matters, which included the grant of school lands to the new state. As court decisions regarding Indians must be understood with respect to the time they are made and the overall circumstances involved (see *FEDERAL INDIAN LAW*, *supra*, at 23), so must the effect of the Utah Enabling Act. Grants to states for schools have been construed to carry out the intent of Congress. While recognizing the generous policy of the Government with respect to such grants, the Congressional intent as to whether the grant is to take effect must be ascertained by the condition of the country when the acts were passed, as well as the purpose declared on their face, and all parts of the acts should be read together. *Johanson v. Washington*, 190 U.S. 179 (1903). School grants, in particular that of Utah, have also been interpreted by the Supreme Court in relation to other laws and manifested public policy at the time to determine the extent of the grant. *United States v. Sweet*, 245 U.S. 563 (1918). *Cf. Mobile & O.R.R. v.*

Tennessee, 153 U.S. 486 (1894), indicating that legislative contracts should be read in light of the public policy entertained at the time they were made rather than at a later period when different ideas and theories may prevail. They have also been construed with respect to facts pertaining to an Indian tribe's aboriginal occupancy rights, the creation of a reservation, and cession of Indian rights, in cases to be discussed, *infra*.

In short, the interpretation of what lands were deemed to be "owned or held by any Indian or Indian tribes" or "otherwise disposed of" in the Utah Enabling Act, cannot rest alone upon one aspect of the Government's policy toward Indians or upon one rule of statutory construction, but the true legislative intent must be ascertained as of that time in accordance with the usual meaning of the words, the overall purpose of the Act, and, as we have indicated previously, the overall historical milieu out of which it arose, including the public policy of the time, as well as any court interpretations of comparable provisions in other statutes. This is especially necessary in this case as the Tribe's position sets forth a novel and unprecedented extension of concepts of protection of Indian occupancy in relation to a grant to a third party of land then outside the official boundaries of a reservation for a tribe.

b. *Analysis of Sections 3 and 6 of the Utah Enabling Act*

In construing the Utah Enabling Act, we first consider the language of the school grant excepting lands subject to it and the disclaimer provision together to understand the entire Congressional intent. The disclaimer provision in section 3 reads:

* * * the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof; and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; * * * that no taxes shall be imposed by the State on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use; but nothing herein * * * shall preclude the said State from taxing, as other lands are taxed, any lands owned or held by any Indian who has severed his tribal relations and has obtained from the United States or from a person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any Act of Congress containing a provision exempting the lands thus granted from taxation; but said ordinance shall provide that all such lands shall be exempt from taxation by said State so long and to such extent as such Act of Congress may prescribe. (28 Stat. 108.)

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The school land grant in section 6 provides:

That upon the admission of said State into the Union, sections numbered two, sixteen, thirty-two and thirty-six in every township of said proposed State, and where such sections or any parts thereof have been sold or otherwise disposed of by or under the authority of any Act of Congress other lands equivalent thereto, in legal subdivisions of not less than one quarter section and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said State for the support of common schools, such indemnity lands to be selected within said State in such manner as the legislature may provide, with the approval of the Secretary of the Interior: *Provided*, That the second, sixteenth, thirty-second, and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this Act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this Act until the reservation shall have been extinguished and such lands be restored to and become a part of the public domain. (28 Stat. 109.)

As to the phrase in the disclaimer provision in section 3 of "owned or held by any Indian or Indian tribes," and the words "otherwise disposed of" in the grant in section 6, it is apparent that there is no fixed meaning to these words outside of the context of the Act and all the aids in interpreting the Act. For example, the word "held" in statutes relating to land often means that land is "owned" but does not ordinarily mean any particular user. However, it has no established primary or legal technical meaning

so that its meaning must be determined by the context in which it is used. See cases under "held" in 19 WORDS AND PHRASES (1970). See also cases under "otherwise" and "owned" in 30 WORDS AND PHRASES (1970).

Section 3 refers to the extinguishment of "title" to lands "owned or held by any Indian or Indian Tribes" while the proviso in section 6 refers to the extinguishment of an Indian reservation. The use of the word "title" following the words "owned or held" in the disclaimer provision strongly indicates that Congress had in mind a recognized right in existence at that time or, at the least as to individual Indians, an inchoate right perfectable under existing legislation. If lands had been allotted or otherwise granted to an individual Indian they would fall within the category of "sold or otherwise disposed of" within the excepting language in section 6, and would no longer be public land. Note that in section 3 the phrase "owned or held by any Indian" is repeated as to the State's right to tax the lands of an Indian who has obtained a title to land from the United States or some person "by patent or other grant." This supports an understanding that Congress envisaged the acquisition of title by individual Indians under the laws then permitting individual Indians to acquire title to lands both inside and outside reservation boundaries.

We note that the legislative reports on the disclaimer provision refer to the lands "owned or held

by any Indian or Indian tribes" as "such Indian reservation." H.R. REP. NO. 162, 53rd Cong., 1st Sess. 17 (1893); S. REP. NO. 414, 53rd Cong., 2nd Sess. 18 (1894). This indicates that the primary concern of Congress was in requiring the State to relinquish any proprietary interest in those lands which had been set aside as Indian reservations regardless of whether the lands were owned or held by a tribe or had then been allotted to an individual Indian. *Cf. Alonzo v. United States*, 249 F.2d 189 (10th Cir. 1957), *cert. denied*, 355 U.S. 940 (1958), which discussed the legislative history of a similar disclaimer made by the State of New Mexico, indicating that Congress required the disclaimer so as to preclude any possible challenge by the State of "titles" acquired by Indians through grants made by the Governments of Spain or Mexico.

As to the meaning of the word "held" in relation to Indian tribes, the historical perspective is necessary. At the risk of oversimplification it must suffice to say that generally the status of lands within withdrawals for the benefit of Indians was uncertain in 1894. Thus, whether a tribe was deemed to "own" lands within a treaty or statutory reservation depended upon the specific language used therein. This later led to express statutory language such as that in the 1958 Act pertaining to the Navajo tribe. The status as to executive order withdrawals was even less certain, but they were not considered then as the equivalent of

treaty or statutory reservations. See *FEDERAL INDIAN LAW*, *supra*, at 613-22; see also *Healing v. Jones*, *supra*. The use of the word "held" by an Indian tribe, therefore, would include areas which had been withdrawn for a Tribe but not then considered as falling within the meaning of being "owned" by the Tribe under federal law, although they would be considered as in a reservation and "otherwise disposed of" under section 6 of the Act.

The only other meaning to "held" by an Indian tribe in the context of the Enabling Act is if a tribe's aboriginal occupancy rights had not been extinguished by Congress the tribe's occupancy might be deemed a holding under its aboriginal "title" as determined under the tests for tribal aboriginal occupancy. But see, *Northwestern Bands of Shoshone Indians v. United States*, *supra*, at 324 U.S. 346, where the Court indicated that the United States had treated unceded or unrelinquished Shoshone territory in Utah and adjoining states as a part of the public domain in administering the territory as though no Indian land titles were involved, and expressly referred to the Utah school land grant, 28 Stat. 109, as such a manifestation. In view of the facts of this case, it is unnecessary to decide whether unextinguished and unrecognized aboriginal occupancy could come within the meaning of the Act. It is clear, however, that the reference in both sections 3 and 6 to extinguishing "title" or the "reservation" in-

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dicates that Congress was not recognizing any tribal occupancy rights to land which it had already extinguished by treaty or statute or which was not then withdrawn as a reservation for Indians and showed a possibility, in accordance with the overall policy of the time, that existing reservations might be reduced or opened for disposal as public lands. We see nothing in the Utah Enabling Act and in the historical milieu then and in 1900 which indicates that Congress intended to hold in abeyance the State's grant to school lands within an area, where any aboriginal title had been extinguished, where a proportionately few members of a tribe were outside the established reservation boundaries for the tribe and using an even wider undefined area for grazing purposes and certain other limited purposes in a transitory fashion together with Indians from other tribes and with non-Indians also in the area, which is the situation in this case.

It appears that the disclaimer was of lands which would fall within the meaning of lands "otherwise disposed of," or were within a reservation as provided in section 6, and that the two provisions are *in pari materia* insofar as determining what lands come within the grant to the State or were excepted from the grant. Therefore, it is essential to determine whether lands would be considered as excepted from the grant because they were "otherwise disposed of" to ascertain the effect of the disclaimer. This conclusion is

supported by a consideration of the cases upon which the Tribe relies for its interpretation and other matters essential in ascertaining the true legislative intent. See *United States v. Jackson*, 280 U.S. 183, 193 (1930).

c. *Analysis of Judicial Precedents*

One of the most important cases upon which the Tribe relies to establish that protected Indian occupancy may bring the lands within the status of lands "otherwise disposed of" under the terms of the school grant in section 6 of the Utah Enabling Act, 28 Stat. 109, is *United States v. Cramer*, *supra*, which held that the possession of a tract of land by individual Indians falls within the clause of the grant to a railroad excepting from its operation lands "reserved * * * or otherwise disposed of." 261 U.S. 219, 230. The Tribe also contends that the Court's reference in *Cramer* at 228 to the specific 2nd provision in the disclaimer provision in section 3 of Utah's Enabling Act, 28 Stat. 108, which includes Indian tribes as well as individual Indians, indicates that tribal rights were recognized by *Cramer* as well as individual rights. The State responds that the rights recognized in *Cramer* were aboriginal occupancy rights. The Tribe contends that they were not. The quotation from *Kabinto*, *supra*, regarding *Cramer*, suggests they were. In any event, the significant fact is that the Indians in *Cramer* had no reservation where they could

be protected from intrusions of non-Indians. Although a reservation for the Indian tribe had been proposed to Congress, it was rejected and apparently no governmental action was taken to provide for the Indians. The Court equated the individual rights with tribal aboriginal rights by indicating that the policy of protecting "original nomadic tribal occupancy" should apply also to individual Indian occupancy emphasizing "such occupancy being of a fixed character lends support to another well understood policy, namely, that of inducing the Indian to forsake his wandering habits and adopt those of civilized life." (*Id.* at 227.) The Court also distinguished the facts from the case of *Buttz v. Northern Pacific R.R.*, 119 U.S. 55 (1886), which held the fee was granted to the railroad subject to the right of occupancy of Indians and the right of the company immediately attached free from Indian title when the United States thereafter extinguished the Indian title. It indicated that the possession of the Indians in *Cramer*, however, "was within the policy and with the implied consent of the Government. That possession was definite and substantial in character and open to observation when the railroad grant was made ***" (*Id.* at 230.) The Court specifically refused to extend the right of the Indians to the entire subdivision but limited it, saying:

Here the claim for the Indians is based upon occupancy alone, and the extent of it is clearly fixed by the inclosure, cultivation and improvements. The evi-

dence does not disclose any act of dominion on their part over, or any claim or assertion of right to, any lands beyond the limits of their actual possessions as thus defined. Under the circumstances, their rights are confined to the limits of actual occupancy and cannot be extended constructively to other lands never possessed or claimed, simply because they form part of the same legal subdivisions. (*Id.* at 235.)

* * * * *

This is in accordance with the general rule that possession alone, without title or color of title confers no right beyond the limits of actual possession. * * * (*Id.* at 236.)

As precedent for any understanding of the phrase "owned or held by any Indian or Indian tribe" in the Utah Enabling Act, the *Cramer* case would appear to restrict the meaning of "held" to occupancy limited by tangible acts of possession defined by enclosures, cultivation or improvements.

Although the Navajo tribe had an established reservation, whereas the Indians in *Cramer* did not, the Tribe contends that the standard of occupancy pertaining to the Navajos should be different from *Cramer* because of the different life style of the Indians and now because the Tribe is asserting tribal rather than individual rights.

The Tribe relies upon cases regarding Alaska natives to support its contention that there is an additional tribal occupancy right recognized under federal law in addition to the original aboriginal tribal right. Most of the Alaska cases involve interpretations of section 8 of the Alaska Organic Act of May 17, 1884, 23 Stat. 26, pertaining

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to the then territory of Alaska and which provided:

That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for further legislation by Congress. * * *

And, in addition, some of the cases interpret the disclaimer in section 4 of the Alaska Statehood Act of July 7, 1958, 72 Stat. 339, 48 U.S.C. Ch. 2 note (1970), which provides in part:

* * * said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives. * * *

The Tribe relies especially upon *Miller v. United States*, 159 F.2d 997 (9th Cir. 1947), as recognizing Indian rights of occupancy by virtue of section 8 of the Act of May 17, 1884, quoted above, although it rules that aboriginal rights of natives of Alaska had been extinguished by the 1867 purchase treaty between the United States and Russia. It contends that similarly the Utah Enabling Act meant to protect the Indian occupation of the public domain and prevented passage of title to any lands subject to such occupancy. The State points

out that in *Miller* the court expressly distinguished between any tribal type of occupancy and individual rights and recognized only individual rights under the 1884 Act. It also contends that the *Miller* ruling as to the extinguishment of aboriginal rights has been discredited and overruled by the Supreme Court in *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955), and *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 106 (1949). The State suggests that the 1884 Act and subsequent legislation pertaining to Alaska merely preserved the right of nondisturbance of the occupancy of the Indians, neither granting nor taking away anything they might otherwise have pending future legislation. *Id.*; *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962). In response, the Tribe agrees that the 1884 Act pertaining to Alaska preserved the status quo as to occupancy rights until further Congressional or judicial action was taken, although it was not intended as a grant of permanent rights. *Tee-Hit-Ton Indians, supra*, at 278. It contends that the Utah Enabling Act also preserved the status quo by withholding from Utah any lands occupied by Indians or Indian tribes, and that Congress relinquished its beneficial title to the Tribe by the Act of March 1, 1933, by extending the reservation boundaries to include the area. It contends that the rulings in the Supreme Court cases cited above indicating that there were no compensable rights in the Alaska natives

created by such legislation are irrelevant to the question of the protection of their occupancy rights with regard to third persons.

In *Organized Village of Kake v. Egan, supra*, the Court discussed the legislative history of the disclaimer provision in section 4 of the Alaska Statehood Act quoted above and found that

[I]t was understood that the disclaimer provision left the State free to choose Indian "property" if it desired, but that such a taking would leave unimpaired the Indians' right to sue the United States for any compensation that might later be established to be due.

369 U.S. 65-66. It also found that the provision was suggested by the Interior Department so that Alaska "be dealt with as had other States." (*Id.* at 68.) Although it indicated that the disclaimer of right and title by the State was a "disclaimer of proprietary rather than governmental interest," it was the best way to ensure that statehood would neither extinguish nor establish claims by Indians against the United States so that if lands subject to the claim of Indian rights were transferred to the State, the Indians were not thereby to lose the right to make claims against the United States for damages. (*Id.* at 69.) Although the case was concerned with State jurisdiction to regulate fishing traps, the discussion does not support any view of the disclaimer provision as creating or confirming occupancy rights in Indians, whose aboriginal rights had been extinguished, which would be superior to grant of lands to the State.

Cf. United States v. Alaska, 197 F. Supp. 834 (D. Alaska 1961).

Another case decided after the Alaska Statehood Act relied on by the Tribe, *Alaska v. Udall*, 420 F.2d 938 (9th Cir. 1969), did not cite or rely on the disclaimer provision in section 4 of the Act or the discussion in *Organized Village of Kake* regarding the operation of the State grant under that provision, instead, it considered the language in the grant of lands to be selected by the State. The State of Alaska sought summary judgment to compel the Secretary of the Interior to issue it a patent to lands which a native village claimed asserting present and aboriginal use and occupancy. The court found there were genuine issues of material fact to be decided and refused to then rule as a matter of law "that under no circumstances could Indian trapping, hunting and camping" constitute a condition which would deprive the selected lands of being "vacant, unappropriated and unreserved land" as required by the grant. In making this ruling the court simply noted section 8 of the Act of May 17, 1884. (*Id.* at 940.)

The historical uncertainty as to the status of Alaska natives, the nature of any right to lands, and the source of such right was not settled by the dictum in *Miller* concerning the extinguishment of aboriginal rights by the Alaska purchase treaty and recognition of protection of possessory rights under the 1884 Act. For some discussion of the vacillating policies and views con-

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cerning these matters see FEDERAL INDIAN LAW, *supra*, Chap. XI, B. It is all too evident from the legislative history of the Alaska Native Claims Settlement Act of December 18, 1971, 85 Stat. 688, and the terms of that Act that Congress believed the Alaska natives might have aboriginal land claims which had not been extinguished and for which compensation had not been allowed under the Indian Claims Commission Act, 25 U.S.C. § 70 *et seq.* (1970). Section 2 of the Alaska Native Claims Settlement Act expressly refers to aboriginal land claims by natives and native groups, and section 4 (85 Stat. 689-90) expressly extinguished all aboriginal titles and claims of aboriginal title in Alaska based on use and occupancy.³¹

The differences in language between the Alaska 1884 Act and the Utah Enabling Act alone warrant a difference in interpretation. Also, the fact at the time the 1884 Act was passed there was no clear policy concerning the Alaska natives or recognition of what rights they might have differentiates the situation there with the situation pertaining to the Navajos where there had been express provision made for them by a reservation and where there also had been express statutory provision for the creation

of individual rights and title to lands outside the reservation under the terms of the Indian Homestead and General Allotment Acts. See *Metlakatla Indians v. Egan*, 369 U.S. 45 (1962), comparing the situation in Alaska with that in the other states, pointing out that few reservations had been made in Alaska as there had been no need to protect the white settler from the peaceful natives as necessary in the other states. Thus, although court interpretations or applications of Alaska native possessory rights recognized under the 1884 Act, and subsequent acts, including the Alaska Statehood Act, are of interest, these differences must be kept in mind because they are reasons for more generous rulings concerning the protection of native occupancy rights than where treaty reservations had been created for a tribe. See an application of this with respect to Departmental regulations to prescribe the necessary occupancy for Alaska natives under the Alaska Native Allotment Act of May 17, 1906, *as amended*, 43 U.S.C. §§ 270-71 (1970). *Acting Solicitor's Opinion of September 21, 1964*, 71 I.D. 340.

Thus, as we have held, the words "owned or held by any Indian or Indian tribes" in the Utah Enabling Act must be considered in light of the existing situation pertaining to Utah and the Indians in that area. Likewise, the provision in the Alaska 1884 Act that "Indians or other persons in said district shall not be disturbed in the

³¹ Section 2(d) of the Act stated:

"No provision of this Act shall constitute a precedent for reopening, renegotiating, or legislating upon any past settlement involving land claims or other matters with any Native organizations, or any tribe, band, or identifiable group of American Indians * * *."

possession of any lands actually in their use or occupation or now claimed by them" is considered in light of the situation prevailing in Alaska at that time. In addition to the fact no general provision had been made for the Indians either by reservations or legislation whereby title to the federal lands could be acquired, in 1884 the general public land laws applicable to the other territories and states were not extended to Alaska, except the mining laws, and the possession of non-Indians as well as Alaska natives was therefore protected by the Act as well. In addition to the then unresolved question as to any aboriginal native claims which prevailed, there was the analogous question of rights of non-Indian settlers, occupants and users of the land, and the Act broadly provided for the non-disturbance of all in that category as of 1884. *Cf. Heckman v. Sutter*, 119 F. 83 (9th Cir. 1902); *Russian American Co. v. United States*, 199 U.S. 570 (1905). That Act arose out of different circumstances from the Utah Enabling Act and may not be construed *in pari materia* with it. *Cf. Acting Solicitor's Opinion of September 21, 1964, supra*.

As to the standard of occupancy required for recognition of the Indians' occupancy rights the Tribe attempts to find analogies in the facts of the cases pertaining to Alaska natives. The State, however, contends that the standards as enunciated by these cases require proof that the possession or occu-

pancy is exclusive; notorious; of such a nature as to leave visible evidence thereof so as to put strangers on notice that the land is occupied; that the extent of the possession or occupancy must be reasonably apparent; and it must be substantial. As indicated, the Tribe has contended that the particular type of lifestyle of the Indians involved must be the basis for the standard by which the occupancy is recognized citing *Mitchel v. United States, supra*, and *United States v. Santa Fe Pacific R.R. Co., supra*. These cases, as the Director indicated, pertained to aboriginal tribal occupancy. *Santa Fe* expressly used a standard of "exclusive" occupancy. The Tribe states that words such as "exclusive" and "notorious" are rich in meaning in Anglo-Saxon legal tradition but are inapplicable to the traditional pastoral mode of life of the Navajos or the mode of life of the Alaska natives.

From a statement in *United States v. Alaska*, 201 F. Supp. 796 (D. Alaska 1962), the Tribe coins its own standard as to the test to be applied, namely, an "essential to livelihood" concept dependent on the context of the natural environment and life style of the individual Indian or Indian tribe in question, as limited by two criteria suggested by that case and *United States v. 10.95 Acres of Land*, 75 F. Supp. 841 (D. Alaska 1948): (1) whether the native use and occupation is sufficiently *intensive* to be considered equivalent, in a tribal context, to the traditional "notorious,"

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"exclusive" and "visible" concepts, and (2) whether the native use has been continuous into modern times.

The test actually stated by the Court in *United States v. Alaska* was that the possessory rights "must not only be notorious, exclusive and continuous, but must also be substantial." 201 F. Supp. at 800. Similar language is used by the court in *United States v. 10.95 Acres*, adding that the occupancy must be "of such a nature as to leave visible evidence thereof so as to put strangers upon notice that the land is in the use or occupancy of another, and the extent thereof must be reasonably apparent." 75 F. Supp. at 844. The court refused to hold that navigating and anchoring boats and gathering shellfish without more was sufficient, and that there was no "continuity * * * of use or occupancy sufficiently to put a stranger on notice or enable the Court to fix the boundaries or the area thereof as to the defendants or any one of them." *Id.* The cases, therefore, give the standard of proof suggested by the State.

A difficulty with the Tribe's suggested semantical innovation of the standard is that its first suggested limitation as to the "intensity" of tribal occupancy suggests an equivalence to the traditional concepts enunciated in the court cases of "notorious," "exclusive" and "visible," but does not suggest how this limitation differs from that in *Santa Fe* which required aboriginal tribal occupancy to the exclusion of other tribes. It also does not suggest

the degree of intensity of use which would meet the equivalency tests or any differences from them.

The State contends that even under the Tribe's proposed test the facts do not meet the suggested standard. The Tribe, however, contends that the lands were used primarily for grazing purposes which use was essential to the livelihood of the Navajos "as a substantial predominant occupant." It contends that the record "conclusively demonstrates that sheep grazing, an essential condition of Navajo life and livelihood, was the dominant use of the areas here in question as of May 1, 1900." (Tribe's Supplemental Brief, p. 14.) It adds that this use has continued over the years. "Indeed, if anything, the use of the lands here in question has probably intensified with the passage of years due to the increase in Navajo population." (*Id.* at 15-16.) It contends the record shows a pattern of Navajo expansion far north of the San Juan River prior to 1900,

* * * fueled by population pressures, by drought, by inadequate forage and by semi-starvation. While the record indicates continuing fluctuation of the Navajo-Anglo line of contact, it nonetheless clearly shows that the two sections here in question (one located about three miles and the other about seven miles north of the San Juan River) were well within the perimeter of Navajo use and occupancy both before and after 1900. (*Id.* at 17.)

Because of the nature of the evidence in this case concerning Navajo occupancy the Tribe's position must, at best, rest upon this stated

position that the disputed sections were within the perimeter of Navajo use and occupancy as the evidence does not adequately establish actual occupancy of the two disputed sections in 1900. The Tribe asserts it was "a substantial predominant occupant" but not the only occupant of the Aneth extension area. Although the evidence indicates that some Navajos traveled with their flocks of sheep north of the San Juan River prior to 1900, the record also establishes that the same area was used by non-Indians, primarily livestock men, and by Indians from other tribes.

Under the Tribe's suggested standard of occupancy, however, apparently concurrent use of the area by non-Indians or other Indians might not be fatal to the Tribe's claim. If the Indian occupancy is to be judged, as the Tribe suggests, by the land "essential to their livelihood" according to the mode of life of the particular Indian group, the use of the Utes and Paiutes traversing through the general area to hunt, pick the wild food, and for those few who had flocks to graze them, would be equally applicable. Would the intensity of their use of hunting or gathering the wild food be less substantial or dominant than the Navajos' grazing where both groups traversed wide areas with only transitory encampments? Or would their cultural differences in types of structures used for their camps as well as the means of their obtaining a livelihood make any difference under the Tribe's sug-

gested standard? How is the use by non-Indians to be judged? We pose these questions only to show some difficulties with the Tribe's standard as applied to the facts of this case.

The Tribe's suggested standard of proof for Indian occupancy to be deemed "held" by any Indian or Indian tribes under the Utah Enabling Act is much less than that imposed by the Supreme Court in *Cramer* as to an individual Indian who had no reservation, and by the Court in *Santa Fe*, *supra*, which prescribed a test of exclusive occupancy for tribal aboriginal title. See also *Assiniboine Indian Tribe v. United States*, 77 Ct. Cl. 347, 368 (1933), *appeal dismissed* 292 U.S. 606, where no aboriginal possessory right in a tribe was recognized because other tribes traversed the land as well. We adhere to the recognized standard of exclusive occupancy in these cases. We add, with all due respect to the Indian Claims Commission, the record before us does not establish to our satisfaction such occupancy of the Aneth extension area by the Navajo Tribe to the exclusion of other tribes in the area prior to 1868, and as of the time of the Utah Enabling Act and 1900. This leads to the decisive question in this case. Did Congress by the Utah Enabling Act intend to preclude the grant of the school lands to the State under the factual circumstances involved here? We must conclude that it did not.

While the Tribe asserts that its aboriginal rights are not involved here, the matter of its Treaty and the extinguishment of the Tribe's

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aboriginal rights are relevant in comprehending the scope of meaning to the words in the Utah Enabling Act. Unlike the situation in Alaska where there was doubt as to the status of native claims to land and there was a clear manifestation that future legislation would be passed for the acquisition of vested rights, there is no such manifestation expressed in the Enabling Act. Likewise, there are no subsequent acts similar to those involved in Alaska prior to its grant of Statehood specifically recognizing and protecting certain types of occupancy or possessory claims. *See, e.g.*, those pertaining to tidelands discussed in *United States v. Alaska*, 197 F. Supp. 834 (D. Alaska 1961); or of fishing rights generally, *Organized Village of Kaks v. Egan, supra*. The Tribe points to no comparable legislation pertaining to Utah prior to the effective date of its grant which would expressly protect occupancy of an area or of a specified type of use by Indians or groups of Indians.

Regarding the Utah grant, let us also compare cases stemming from the school grants for the States of Wisconsin and Minnesota which provided for lieu selection rights for sections which were "sold, reserved or disposed of." Where by treaty the United States set aside lands as a reservation for Indians before the survey of the school sections which would vest title in the State, and the Indians remained in occupancy of the lands, the Supreme Court held that such reserved lands

were excepted from the state's grants. *Wisconsin v. Lane*, 245 U.S. 427 (1918); *United States v. J. S. Stearns Lumber Co.*, 245 U.S. 436 (1918); *Minnesota v. Hitchcock*, 185 U.S. 373 (1902). Likewise, where the Indians were permitted under a treaty to occupy land until required to leave by the President and subsequently by another treaty a reservation of such land was created for them, the Court held the State's title did not vest. *Wisconsin v. Hitchcock*, 201 U.S. 202 (1906). These cases were prior to the right of Indians to assert claims against the United States. The Court emphasized the alternative available to the State to select indemnity lands for the school sections, whereas the Indians had no alternative right or relief. However, where the Indians by treaty retained the right of occupancy for a time and there was no subsequent treaty confirming their right to the land and they moved from the land, the state was held to have title to the land rather than a party claiming a patent from the tribe under a statute authorizing the tribe to sell certain lands occupied by it. *Beecher v. Wetherby*, 95 U.S. 517 (1877). The Court in *Beecher* and in a railroad grant case, *Buttz v. Northern Pac. R.R.*, 119 U.S. 55 (1886), concluded that Congress intended to transfer the fee subject to the existing recognized occupancy of the Indians only so long as it continued.

In *United States v. Minnesota*, 270 U.S. 181 (1926), the Court held that the State could not be divested

of its right and title to lands previously granted to it under its swamp land grant even to benefit Indians, where Indian reservations were created by treaty thereafter, although a reservation prior to the grant excepted such lands from the grant. From these cases, it is clear that if tribal rights are terminated by relinquishment in a treaty or are abandoned, a state may take the grant unencumbered with a claim of occupancy rights in the Indians, and if the state's title has vested, subsequent action by Congress to create a reservation for Indians cannot affect the state's title. However, if a reservation has been created prior to the grant, the lands are reserved and the state's title cannot vest until the reservation is extinguished. These cases support our conclusion that lands within the established reservation boundaries for the Navajo Tribe did not pass to the state, but lands outside those boundaries were not excepted from the grant or held in abeyance.

d. *Other Historical Factors Pertaining to State Grants and Indian Occupancy*

(1) *Legislative Framework of Laws*

The Congressional framework of laws generally pertaining to state school grants and indemnity selections in lieu of the school sections also militates against the construction which the Tribe suggests. By the Act of February 28, 1891, amending earlier legislation, R.S. §§ 2275, 2276, 43 U.S.C. §§ 851, 852 (1970), and as expressly extended to Utah by the Act of May 3, 1902,

43 U.S.C. § 853 (1970), states were permitted to select other lands where school sections prior to survey were included within any Indian reservation, although the state could await extinguishment of the reservation and then take the sections in place. The Act required the Secretary of the Interior, without awaiting the extension of the public surveys, to determine by protraction or otherwise the number of townships that would be included in such reservations so that a state may determine the number of sections it could select on a section for section basis. Obviously Congress was not envisaging at that time, when many reservations had been set apart for Indian tribes throughout the country, recognition of tribal rights outside the established reservation boundaries of tribes who had reservations. See *Northwestern Bands of Shoshone Indians v. United States, supra*.

The history of Congressional treatment of Indians is contrary to any such recognition at that time when there was a general policy to assimilate the Indians and to reduce the established reservation areas so that they could be opened for disposition under the public land laws. The fact that the Navajo reservation was enlarged periodically, rather than reduced, does not signify any difference in Congressional intent in 1894 toward the Navajo Tribe under the Utah Enabling Act. Navajo tribal occupancy outside the original Navajo reservation was only recognized after withdrawals of land in behalf of the Tribe and

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clear administrative action under the terms of such withdrawals. *Healing v. Jones, supra.*

Note that by Executive Order of November 14, 1901, certain lands in Arizona were "withdrawn from sale and settlement until such time as the [Navajo] Indians residing thereon shall have been settled permanently under the provisions of the homestead laws or the general allotment act * * *." Of similar effect are two other withdrawals for the Navajos, Executive Order of May 17, 1917, for lands in Arizona and Executive Order of January 19, 1918, for lands in New Mexico. These orders show an intent by the President and the Administration at that time and as late as 1918, to protect individual Navajo occupancy by a withdrawal until the lands could be disposed of to the individuals, rather than to benefit the Tribe as an entity then. Compare these orders with the 1905 Executive Order pertaining to Utah. Of course, no such withdrawal was made for the area in question here until 32 years after the State's title vested, which supports an inference against any governmental recognition of Indian occupancy rights in the area, apart from any that could be acquired by individual Indians in compliance with the settlement laws.

Other than its contentions regarding the Utah Enabling Act, the Tribe has referred to no legislation, and none has come to our attention, whereby the Tribe could acquire a possessory or proprietary interest in lands outside its reservation

boundaries at that time. We have indicated, however, that individual Indians outside reservations could acquire interests in land by compliance with specific statutes, the Indian Homestead Act or section 4 of the General Allotment Act. Those acts have been construed *in pari materia*, *United States v. Jackson, supra*. The Act of February 28, 1891, provided also that where settlements had been made before survey with a view to preemption or homestead the grant to the State was subject to the claims of the settlers, and lieu selections could be made for such lands and could also be made where other school sections were "otherwise disposed of by the United States." Under this and the Utah Enabling Act the State could take indemnity for lands in Indian homesteads or which had been allotted under the General Allotment Act.

In interpreting the 1891 Act providing for lieu selections, the Department concluded that as to mere settlements made with a view to preemption or homestead, the State's school grant would be held subject to the settlement and the State could claim the land in place in case the settler failed to perfect his claim, or the State could select other land to satisfy any loss occasioned by the claim. If, however, the lands were within existing allowed entries, they came within the excepting phrase "otherwise disposed of" and the State would have to select other lands as indemnity as the grant would not attach if the entry

were subsequently canceled. *State of Utah (On Petition)*, 47 L.D. 359 (1920). A settlement initiated after the survey of the school section could not affect a state's grant. *Fannie Lipscomb*, 44 L.D. 414 (1915). See also *Hamilton v. State of California*, 45 L.D. 471 (1916), which held that possession and improvement of a tract of unsurveyed land by one who at the date of the survey was then disqualified to make a desert land entry did not except the tract from the school grant to the State. Compare *Herbert H. Hilscher*, 67 L.D. 410 (1960), involving a conflict between an Alaska native and a homestead settler. The native claimed she had lived upon the disputed tract years before with her parents but for the last 10 to 15 years her only occupancy of the tract was storage of a boat. This was deemed insufficient to defeat the intervening claim. In *Tillie Buth*, 46 L.D. 494 (1918), a homestead claimant's settlement was held not to constitute a valid adverse appropriation preventing a state selection of her claim as she had not complied with the homestead law and did not "seasonably" assert her rights. Therefore, her laches and the intervening state selection defeated her application. These rulings that a State's grant vests where a settlement claim is not perfected apply to settlement claims of Indians under the Indian Homestead and General Allotment Acts.

Although the Tribe contends that cases involving homestead or preemption settlers have no bearing on Indian rights, it has long been rec-

ognized that the Indian Homestead Act and section 4 of the General Allotment Act are settlement statutes and part of the framework of laws pertaining to the public lands.

The practice, rules and decisions governing white settlers on the public lands are with certain reasonable modifications due to the habits, character, and disposition of the race, equally applicable to Indian settlers. *Lacey v. Grondorf*, 38 L.D. 553, 555 (1910).

That case pointed out that Indian settlers on public lands are not in the same situation as are allottees of tribal lands where rights flow from some specific act for the division of tribal property, but are on practically the same footing as white settlers on the public lands. *Id. and cf. Acting Solicitor's Opinion of September 21, 1964*, 71 I.D. 340, ruling that the Alaska Native Allotment Act should not be construed *in pari materia* with section 4 of the General Allotment Act as the latter act required a "settlement" whereas the former Act gave a preference right for lands "occupied" by a native. As to section 4 of the General Allotment Act, it was stated in *Martha Head*, 48 L.D. 567, 571 (1922),

An Indian no more has a vested right to an allotment on the public domain than has a homesteader under the general homestead laws prior to the performance of certain required conditions * * * in the absence of such legislation * * * an Indian would not be entitled to apply for public lands.

Accord, *Clark, Jr. v. Benally*, 51 L.D. 91, *on rehearing*, 51 L.D. 98, 101 (1925), which construed section 4 of the General Allotment Acts as

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one of the nonmineral land laws. Benally was a Navajo who chose land described by the Department as not too advantageous for agricultural or grazing purposes, but the best grazing land in San Juan County. The Department held it was without authority arbitrarily to deny the allotment on the ground the land was too poor in quality. But see, since the enactment of the Taylor Grazing Act requiring classification of lands before settlement, cases reaching an opposite conclusion on the question of the Secretary's authority to deny an allotment of land which would not constitute an economic agricultural unit for an Indian family. *Finch v. United States*, 387 F.2d 13 (10th Cir. 1967), *cert. denied* 390 U.S. 1012 (1968); *Hopkins v. United States*, 414 F.2d 464 (9th Cir. 1969); *but cf. United States v. Arenas*, 158 F.2d 730 (9th Cir. 1947), *cert. denied* 331 U.S. 842.

Although in *Cramer* and *Schumacher*, allotment applications had not been filed at the time of the grant to the third party, substantial improvements were alleged and permanent settlement made prior to the time of the vesting of the grant. In these cases the Court and the Department recognized substantial equities in the individual Indian settler and applied general principles of law which have pertained to non-Indian settlers, as well as recognizing the strong protective policy toward Indian occupants. Thus, *Cramer* applied a general principle regarding possession

without color of title in limiting the rights of the Indians to the land enclosed and improved. In *Nav. Ex. 245*, the Commissioner of the Indian Office in 1887, in response to a New Mexico attorney's question as to whether a white man could enter land in the possession of a Navajo outside the reservation referred to the General Land Office Circular of May 31, 1884, quoted previously and then quoted from *Atherton v. Fowler*, 96 U.S. (6 Otto) 513, 519 (1877), which involved conflicting preemption claimants:

* * * The generosity by which Congress gave the settler the right of preemption was not intended to give him the benefit of another man's labor, and authorize him to turn that man and his family out of their home. It did not propose to give its bounty to settlements obtained by violence at the expense of others. The right to make a settlement was to be exercised on unsettled land; to make improvements on unimproved land. To erect a dwelling-house did not mean to seize some other man's dwelling. It had reference to vacant land, to unimproved land; and it would have shocked the moral sense of the men who passed these laws, if they had supposed that they had extended an invitation to the pioneer population to acquire inchoate rights to the public lands by trespass, by, by violence, by robbery, by acts leading to homicides, and other crimes of less moral turpitude.

This is the essential spirit of the protection also afforded in *Cramer*, *Schumacher* and *Ma-Gee-See*, and recognized by Congress by section 3 of the Act of February 25, 1885, 43 U.S.C. § 1063 (1970). As the Tribe's exhibits of archival materials reflects, where a Navajo occupant made a substantial and perma-

nent settlement on land outside the reservation, constructing improvements and providing for himself on his settlement, notices were sent to the land offices of their occupancy, or notices were given to the individual Indians to show to anyone who might question their right to be outside the reservation or interfere with them.

Although under section 4 of the General Allotment Act an Indian who had made settlement upon public land could acquire for himself or his minor children a maximum of 160 acres of grazing land for each one, no applications have ever been filed for these lands, although descendants of several of the Indians upon whom the Tribe relies as occupants of the area at the turn of the century were allotted lands. No matter how inadequate 160 acres of grazing land in that area may be, that was the maximum allowable at that time by Congress. Grazing of open, unreserved public land as stated in *Buford v. Houtz, supra*, was then permitted generally with the implied consent of the United States. Such grazing use prior to the Taylor Grazing Act created no vested interests in the land. *Jane M. Sandoz*, 60 I.D. 63, 66 (1947). In the absence of any application for an allotment by an Indian in due time to perfect any inchoate settlement rights under the Indian Homestead Act or General Allotment Act to protect only a grazing use, the State's title vested as of 1900. *Cf. Tarpey v. Madsen*, 178

U.S. 215 (1900); *John David Smith*, A-28829 (September 17, 1962). Note that the regulations pertaining to section 4 allotments provide that allotments

are allowable only to living persons or those in being at the date of application. Where an Indian dies after settlement and filing of application, but prior to approval, the allotment will upon final approval be conformed to the heirs of the deceased allottee. 43 CFR 2531.1(c) (1).

We find there were no permanent structures built upon these disputed sections as of 1900 and the facts are far different from those in *Cramer*, *Schumacher* and *Ma-Gee-See* where there was permanent and substantial occupancy by an Indian seeking protection of his rights. The evidence does not adequately establish that the disputed sections were ever settled upon permanently by identifiable Indians, but at most were only occupied for summer grazing camps in a transitory manner after 1900, as one of many sites occupied by the same few individuals.

We know of no basis under the facts in this case whereby the State could have made an indemnity selection for these lands in the absence of an application by an Indian or non-Indian under the public land laws merely because either may have used the disputed sections for grazing purposes, until the Aneth Extension Act of 1933 authorized such selections under its terms. *Cf. Solicitor's Opinion of December 28, 1922*, 49 L.D. 376.

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(2) *Governmental Non-Recognition of Tribal Rights in the Area*

A further difficulty with the Tribe's position is that the history of the United States Government's administration of the area in question as reflected in this record does not show any recognition that the area was "otherwise disposed of" to the Tribe or being "held" for the benefit of the Navajo tribe. The administration of the area was inconsistent with that notion. Within the area suggested by the Tribe as the perimeter of its occupancy which was added to the reservation in 1933,²² applications under the public land laws were allowed prior to that time. For example, in 1907 the State of Utah selected section 10, T. 40 S., R. 26 E., contiguous to the McElmo Creek section 16 in question, as school indemnity land. It was clearlisted to the State in 1910 (State Ex. 33). Two patented desert land entries were initiated in 1907 and two others initiated at that time were later cancelled for reasons not pertaining to Indian occupancy (State Exs. 1, 2, 5, 34, 35). See footnote 16, *supra*, describing Shelton's report on 113 placer mining claims located prior to but within the 1905 extension of the reservation in Utah. Later much of

the land in both townships in question was covered by oil and gas permits in the 1920's (State Exs. 2, 4, 5). One application for a permit for the McElmo section in dispute was rejected by the General Land Office stating that the records showed the land to be school land of the State of Utah (State Ex. 5).

Also, the fact that allotments were allowed to Indians in the Montezuma Creek area under section 4 of the General Allotment Act militates against the Tribe's position rather than supports it. Section 4 allotments, in distinction to those made inside reservations under section 1 of the General Allotment Act of 1887, 25 U.S.C. § 331 (1970), were authorized for Indians not residing upon a reservation who made settlement upon public lands "of the United States not otherwise appropriated," 25 U.S.C. § 334 (1970). This is the antithesis of the Tribe's contention that the lands were "otherwise disposed of" or "held" for the Tribe. In an early contemporaneous construction of section 4 of the General Allotment Act, an opinion by the Assistant Attorney-General, approved by the Secretary of the Interior on June 27, 1899, indicated lands subject to settlement and allotment under that section were not Indian lands subject to the jurisdiction of the Commissioner of Indian Affairs, but were unappropriated public lands falling within the jurisdiction of the Commissioner of the General Land Office, 28 L.D. 564, 568. Therefore, whether the lands sought to be al-

²² Generally for the purpose of this discussion this area has been assumed *arguendo* as including the area added by the 1933 Aneth Extension Act. At the oral argument counsel for the Tribe would not specify the limits of the area alleged to be within that perimeter, suggesting only that the area found by the Indian Claims Commission to have been within its aboriginal occupancy prior to the 1868 Treaty might be a limit, but not conceding that it would be.

lotted were of the character subject to allotment, whether the required settlement had been effected, whether the Indian applicant had a prior and better claim to the land, and was seeking the land in good faith, rather than to obtain it for the benefit of another not entitled thereto, were questions relating to the disposition of the public lands for the General Land Office to decide. The Indian office was to decide only whether the applicant was an Indian and a non-reservation Indian *Id.*

A letter to the Commissioner of Indian Affairs dated September 29, 1932, by officials of the Indian Office and Navajo Agency investigating the area proposed to be added to the Navajo reservation listed 17 non-Indian homesteads within the proposed addition (Nav. Ex. 616). Three of these were patented, one had been allowed, the others were filed in 1931 or 1932. The letter also listed only nine Navajo Indians (apparently the male heads of the families) within the area proposed to be added to the reservation, with a total of 35 children, and having a total of 2,450 sheep. It also indicated five other heads of families living on Montezuma Creek had stock and had used the proposed addition. It mentioned 14 other Indians who lived outside the proposed area on Montezuma Creek, San Juan River, and Recapture Wash. It indicated that the Indians lived along Montezuma Creek, Recapture Wash, and San Juan River

in the summertime, but ranged their stock and lived on McCracken Mesa in the winter.

The use of McCracken Mesa was mentioned because much of the pressure which led to the 1933 reservation was over complaints by non-Indian stockmen as to Indian grazing on McCracken Mesa to the north. An agreement was reached by the stockmen and Indian Office officials to divide the range between Montezuma and Recapture Creeks between the two groups providing the Indians would not use the non-Indians' winter range during the summer and the non-Indians would not use Indian range at anytime (Nav. Exs. 610, 611, 612, 613).

In the Congressional reports on the bill which became the 1933 Act, there is little specific mention about the lands except a statement that they were "used by Indians." H. R. REP. NO. 1883, 72nd Cong., 2d Sess. 3 (1933). Also, on page 44 of a report by Special Commissioner Hager generally regarding Navajos and proposed extensions of the reservation, in S. DOC. NO. 64, 72nd Cong., 1st Sess. (1932), the Aneth area addition of about 51,480 acres is proposed "in order to take care of a number of allotted Indians and other roving Indians in the vicinity." Nothing in the 1933 Act or its legislative history suggests that Congress then did not recognize the State's title in surveyed school sections at that time or that it intended to affect the State's title without action by the State. Instead, section 2

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of the Act, 47 Stat. 1419, provides that the State of Utah "may relinquish such tracts of school land within the areas added to the Navajo Reservation by section 1 of this Act, as it may see fit in favor of the said Indians." It then provides for lieu selections to be made in the same manner as provided in the Enabling Act, except the payment of fees or commissions is waived. This waiver of fees was explained in the legislative history because the reservation was made to benefit the Government in its administration of the Indians (see Commissioner's report in S. REP. NO. 1199, 72nd Cong., 2d Sess. 3 (1933)).

Likewise, the declaration of trust as to public lands within the exterior boundaries of the Navajo reservation for the benefit of the Navajo Tribe in section (d) of the Act of September 2, 1958, 72 Stat. 1687, was made subject to "valid existing rights" and did not purport to affect the existing State title, nor did the Act of November 20, 1963, 77 Stat. 337 (see n. 28). See *United States v. Minnesota*, *supra*; see also *Navajo Indian Reservation*, 30 L.D. 515 (1901), concerning the exclusion of lands occupied by mineral claimants from the May 17, 1884, Executive Order addition to the Navajo reservation in Arizona, leaving them part of the public domain subject to disposal under the general land laws, and cited in *John D. Archer, Stephen D. Smoot*, 67 I.D. 181 (1960), regarding mining claims

in the 1905 extension in Utah. See also *Solicitor's Opinion*, 57 I.D. 547 (1942), holding that Indians who had filed section 4 allotment applications prior to the 1933 Act had acquired equitable rights, as the land was then public land not otherwise appropriated, and the 1933 Act did not cut off their rights, which had already vested.

As the archival materials discussed previously establish, prior to and after 1894 and 1900 officials of the Territory and the State of Utah, the citizens in the area, the military officials and Indian Office officials, regarded the general Aneth area outside the established reservation boundaries as public land subject to use and disposition under the public land laws, and not as land which the Government was holding for the benefit and use of the Indians. A proposal that the area be set aside for the Ute Indians in the 1890's was rejected. There was no such proposal for the Navajos although many other proposals for additions to their reservation had been made, most of which were ultimately acted upon. We note that existing legislation in 1894 provided for the protection of land "belonging to any Indian or Indian tribe" by subjecting any person who "drives or otherwise conveys any stock of horses, mules, or cattle, to range and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe" to a penalty of \$1 for each animal of such stock. R.S. § 2117, 25 U.S.C.

§ 179 (1970).³³ Likewise, any person who makes settlement

on any lands belonging, secured, or granted by treaty with the United States to any Indian tribe, or surveys or attempts to survey such lands, or to designate any of the boundaries by marking trees, or otherwise, is liable to a penalty of \$1,000.

The President was authorized to use military force if necessary to remove such person from the lands. R.S. § 2118, 25 U.S.C. § 180 (1970). Cf. Act of February 25, 1885, 43 U.S.C. §§ 1061-66 (1970).

Rather than Government officials invoking these provisions to penalize the settlers or the livestock men who drove their stock throughout the Aneth extension area until the agreement reached in the early 1930's purporting to divide the range between the Indians and the non-Indians prior to the 1933 Act, the right of the non-Indians to make settlements and to use the land as grazing land was recognized. Indeed, prior to 1900 military force was used to return Navajo and Ute Indians in southern Utah to their reservations so they would not disturb non-Indians in the area. This is a further manifestation that there was no Governmental recognition of any occupancy right in the Indians in the area superior to the rights of

third parties, including the State, but that the contrary was true under the policies of that time.

At most, prior to 1900 there were only a few expressions by Indian officials that Indians outside the reservation would have the same rights to graze upon the public lands as the non-Indians, but that they would also be subject to the same laws, including those within the police power of the State, as non-Indians. The special protection and privileges of Indians in the reservation would not prevail outside the reservation. It is not for us to judge in light of modern day concepts of civil rights the action or inaction of the Government officials prior to 1900 with respect to the Navajo Indians in Utah.

Conclusions

It is only necessary to determine whether there were such occupancy or proprietary rights in the Indians recognizable under the law which affected the presumptive vesting of the State's title to these disputed sections in 1900.

We must conclude that the evidence does not establish that there were. In view of the Congressional policy at that time concerning Indians and the acquisition of individual rights outside Indian reservations, any express or implied consent by Indian officials of Indian occupancy outside the reservation could not create tribal rights to the land superior to the grant to the State. Cf. *Healing v. Jones*, *supra*; *Jane M. Sandoz*, *supra*.

³³ The word "cattle" was interpreted to include sheep. *Ash Sheep Co. v. United States*, 252 U.S. 159 (1920). That case interpreted an Act of Congress whereby a tribe ceded lands within an established reservation, and held that because the funds from the sale of the ceded lands were to go to the tribe, they remained within the category of "Indian" lands rather than "public lands" within the meaning of § 2117 Revised Statutes. The situation in the present case is different than that in *Ash*.

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The Tribe has referred to the evidence which shows the poor range conditions within the reservation and without, the population increase of the Tribe, the sometimes nearly destitute conditions of the Navajos, and other reasons which caused Navajos to go outside their reservation. In essence its contention with regard to occupancy of land "essential to the livelihood" of the Indians goes to the adequacy of the reservation as it was extended from time to time. We note that the record shows that each time an extension of the reservation was recommended, the recommendation usually indicated that the extended area would be adequate to take care of the needs of the Indians. It is significant that the area including the disputed sections was not added to the reservation until some 33 years after the State's title vested, although other additions had been made to alleviate the problems referred to by the Tribe. With regard to the Tribe's claim of occupancy, we note that recognition of occupancy rights or protection of occupancy rights within the 1933 extension was not even the prime factor leading to the addition to the reservation, but rather the extension was to effectuate a compromise of range conflicts throughout San Juan County, Utah, between Indian and non-Indian grazing users and to make a division of the range. That this division did not work and Navajos continued thereafter to use their preferred range on the McCracken

Mesa is reflected by the *Hatahley* case.

As to whether the reservation and the additions thereto were adequate to support the Indians, and as to their grievances generally with regard to whether the United States Government performed its obligations toward them, this Board is not the proper forum to determine such questions, nor can the State's rights depend on the answers to these questions. Congress has provided under the Indian Claims Commission Act that the Tribe's right to any compensation for its relinquished aboriginal lands and unperformed Government obligations shall be determined by the Indian Claims Commission. The Tribe's pending case before that Commission is the appropriate vehicle for resolution of its claims against the United States Government in this regard.

With respect to the Utah Enabling Act, we conclude that there was no additional tribal occupancy right to lands outside the established reservation boundaries recognized under that Act. In the words of Justice Black in *Ute Indians v. United States*, 330 U.S. 169, 179-80 (1947),

* * * we cannot, under the guise of interpretation create presidential authority where there was none, nor rewrite congressional acts so as to make them mean something they obviously were not intended to mean. *Choctaw Nation v. United States*, 318 U.S. 423, 431-432. We cannot, under any acceptable rule of interpretation, hold that the Indians owned the lands merely because they thought so.

In this case, despite the Tribe's claims, the evidence indicates the Indians knew or should have known the land was outside the area allowed for tribal occupancy in 1894 and 1900. The San Juan River was a definite and recognizable natural boundary, unlike the artificial survey line which was the north boundary of the 1905 Executive Order Withdrawal, where the Indians and others could be confused as to the boundary. Navajo rights to land outside the reservation superior to the State's rights could then only be acquired by individual Navajos in compliance with the settlement laws, and not by the Tribe until a proper withdrawal of the land was authorized for the Tribe's behalf. Such actions had not been taken in 1900. Therefore, an unencumbered fee simple title then passed to the State.

As indicated in the Solicitor's decision, 72 I.D. 361, 366, the Tribe had the burden of proof to overcome the presumptive vesting of the State's title. This burden has not been satisfied in this case.

To summarize, we sustain the findings and conclusions of the Director except insofar as they have been modified by our discussion. We expressly find and conclude: (1) there was no occupancy of the disputed sections by any individual Navajo in 1900, which could preclude the grant to the State; (2) there was no aboriginal occupancy of a tribe to the disputed sections in 1900 to which the State's title would be subject; (3) the Navajo Tribe's abo-

original rights to lands outside the 1868 reservation were extinguished by the Treaty of 1868; (4) there was no other tribal occupancy of the area including the sections in 1900 under the standards whereby tribal occupancy has been recognized which could preclude the grant to the State; (5) any use of the disputed sections by a proportionately few Navajo families for grazing purposes together with other lands in the area did not affect the State's title; (6) a Navajo tribal right of occupancy outside the established boundaries of the Navajo reservation was not protected or recognized by Congress in the Utah Enabling Act; (7) fee simple title to these disputed sections passed to the State of Utah on May 1, 1900, when the plats of survey were accepted.

The Tribe's challenge to the issuance of the confirmatory patent to the States goes to the entire fee title of the State with all of the incidental benefits of ownership, in particular, the mineral values which have been exploited under the State's oil and gas leases. The school grant to the State of Utah contemplated passage of a full fee simple title to the State. *Margaret Scharf, supra*. Except for easements or rights granted to private persons prior to the vesting of the State's title, subsequent Congressional legislation could not impose further amendments or limitations to burden the State's grant. The Act of June 21, 1934, did not change this. *Associate Solicitor's Opinion*, M-36484 (December 26, 1957). The

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Tribe has not contended there are any easements, rights, or other interests in the land to which the State might take subject by virtue of any Indian use of the land. As we have held, there was no Indian occupancy in this case which could preclude the fee simple absolute grant to the State. The Tribe's protest affords no basis for expressing any limiting rights, easements, conditions, etc., to the State's confirmatory patents to these two sections, as provided under the Act of June 21, 1934. Therefore, the Bureau of Land Management shall issue the patents to the State, when this case is returned to it.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Director dismissing the

Tribe's protest on the merits is affirmed as modified by this decision.

JOAN B. THOMPSON, *Member*.

I CONCUR:

MARTIN RITVO, *Member*.

Frederick Fishman, concurring specially.

I agree with the result reached in the main opinion, but believe that the Director's decision more than adequately discussed the pertinent issues. I would adopt the Director's decision *in toto*, except to hold that the Navajo Tribe had standing to protest the State's application for a confirmatory patent to the two sections in question.

FREDERICK FISHMAN, *Member*.

July 24, 1973

HARRY AND MARJORY GRABBERT, APPELLANTS, ROBERT W. SCHULTZ, APPELLEE

12 IBLA 255

Decided July 24, 1973

Appeal from a decision (Worland 44) by the District Manager, Worland, Wyoming, Bureau of Land Management, dated April 6, 1972, denying the appellants' grazing lease application and granting the appellee's grazing application to the extent of the conflict between the two applications.

Reversed.

Administrative Practice—Grazing Leases: Preference Right Applicants

An applicant who asserts a preference to receive a grazing lease under section 15 of the Taylor Grazing Act must have grazing rights in excess of 50 percent on the cornering or contiguous land, and where his rights are merely permissive and are subject to revocation at any time at the will of the owner(s), no preference will be recognized.

APPEARANCES: Harry and Marjory Grabbert, pro se; Richard W. Ferry of McCarty and Ferry, Cody, Wyoming, for appellee.

**OPINION BY MR. STUEBING
INTERIOR BOARD OF LAND
APPEALS**

Harry and Marjory Grabbert have appealed from an April 6, 1972, decision of the Worland, Wyoming, District Office which decided that as between them and a conflicting applicant to a portion of a grazing lease, Worland 44, the

conflicting applicant would be awarded the disputed land.

In December 1971 Harry and Marjory Grabbert filed an application to renew their lease, Worland 44, which they had held since 1954 but which would expire on January 31, 1972. Robert W. Schultz filed a conflicting application. The District Office found them both to be qualified preference applicants under 43 CFR 4121.1-1. After it was determined that there could be no agreement between the parties as to a division of the land, it was decided that an award would be made pursuant to certain criteria contained in 43 CFR 4121.2-1(d) (1) and (2); that is, historical use, proper use of the preference lands, and general needs of the applicants. The decision found that other criteria specified in the regulations were either not applicable in the instant case or that both applicants were equally qualified as to these factors.

The decision held that Schultz better deserved the lease from the standpoint of land pattern, proper use of preference land, and general need. It held that the historical use of the Grabberts was insufficient to overcome those considerations, and it awarded the conflict area to Schultz.

After the Grabberts filed their notice of appeal and statement of reasons on May 4, 1972, the situation of the parties in relation to the preference land involved in this appeal changed. In their original statement of reasons the Grabberts attacked

the District Office's decision for its effect on their ranching operations and they included allegations of Schultz's misuse of his grazing privileges and a discussion of his insincerity as a stable rancher. To those charges Schultz filed an answer and the Worland District Office sent a review of the case refuting the Grabberts' appeal. Because of the District Office's action we allowed both parties an opportunity to respond to the material contained in the District Office's review. All prior documents had relied, in their discussions of the situation, upon Schultz's control of the leased land which he had listed in his application as preference land. However, the Grabberts included with their answer to the District Office's review, a letter from Marathon Oil Company, the partial owner of the land which Schultz used as his preference land, which revoked the grazing privileges on that land which Marathon had granted to Schultz. By a second letter-agreement Marathon awarded those same grazing privileges to Grabbert.

The Wyoming State Director forwarded to this Board a memorandum which explains the ownership situation regarding the land which Schultz had used as his preference land:

These two quarter-sections are part of a group of oil placer claims patented in 1921. The corporation to which the patent was issued was later desolved and ownership of the land was distributed to the stockholders and directors in proportion to their holdings. In the intervening years, every portion of the distributed ownership has been through at least one

transaction, ranging from mortgage collateral to probative wills. At present there are thirty-four owners of record holding 95¼ percent of the ownership. The Park County records are not complete in that at least one bequest dividing ownership of a share is not fully recorded. This serves to illustrate the complexity of the situation when we set out to determine the status of preference of land listed in the Schultz application. At that time, the situation was as follows:

Schultz leased from:	Percent
Marathon Oil Company---	29. 2277743
Helen and Robert Ehrlich -----	16. 9088818
Ehrlico, a corporation---	16. 8899469
Schultz owned-----	4. 3707041
Total control-----	67. 3973071

We have talked to Mr. W. C. Silvester, land man for Marathon Oil Company, and the Marathon lease to Schultz has been canceled and reissued to Grabbert. The present situation is as follows:

Schultz leases:	Percent
Helen and Robert Ehrlich -----	16. 9088818
Ehrlico, a corporation---	16. 8899469
Schultz owns-----	4. 3707041
Total -----	38. 1695328

Grabbert leases:	Percent
Marathon Oil Company---	29. 2277743

Accordingly, the primary question to be resolved is whether, in the light of existing circumstances, Schultz still can be treated as standing on an equal plane of preference with the Grabberts. That is, do Schultz's total undivided interests of less than 39 percent invest him with "control" of the base land within the context of 43 U.S.C. § 315 (m) (1970)? We think not.

The outstanding interests, amounting to 61.8304671 percent

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could be consolidated to create an interest larger than that held by Schultz. It further appears that the appellants are engaged in an attempt to attain a majority interest in the grazing privileges on the land offered by Schultz as base. In addition to the interest which Marathon Oil Company has transferred from Schultz to the Grabberts, the Grabberts have recently submitted letter agreements whereby several other purported owners of undivided fractional interests in Schultz's base land have given their permission to graze that land to the Grabberts. The extent of the interest held by these owners is not given. The appellants advise that they are securing similar permissions from other owners of fractional interests.

We regard the acquisition and extent of grazing privileges by the Grabberts on Schultz's base land as immaterial, except to demonstrate that one who does not have an undivided interest in excess of 50 percent of the alleged preference land may not be said to "control" that land within the meaning and intent of the statute.

Moreover, where the grazier whose grazing privileges on a given tract are merely permissive, so that he is a tenant at will, he may not be said to control the land, because "he hath no certain nor sure estate, for the lessor may put him out at what time it pleaseth him." *Black's Law Dictionary* 1635 (4th ed. 1951). This apparently was the relationship of Schultz with respect to the

interest owned by Marathon Oil Company. It is therefore our opinion that Schultz never had sufficient interest and tenure in the land to control it, and certainly not since he lost the 29+ % interest withdrawn by Marathon.

With reference to land, the courts have held that, in general, to have "control" of a place is to have the authority to manage, direct, superintend, restrict, or regulate. "Control" does not import absolute or even qualified ownership, but means the power or authority to direct, govern, administer, or oversee. The word applied to real property implies possession. See cases collected in 9A *Words and Phrases* (1960).

The word "control" has no legal or technical meaning, and, where used in a statute, must be given such an interpretation as the legislature intended it to have, to be ascertained from the connection in which it is used, the Act in which it is found, and the legislation of which it forms a part. *Gulf Refining Co. v. Fox*, 11 F. Supp. 425, 430 (D. W. Va. 1935). Although the word is not used in the statute, it is used in the implementing regulation, *infra*.

The Taylor Grazing Act, *supra*, provides in its preamble that among its purposes are to provide for the orderly use of public grazing land and to stabilize the livestock industry. In pursuit of these objectives the Act provides mandatory preference for these applicants who are owners, homesteaders, lessees, or

other lawful occupants of contiguous or cornering lands. To hold that this preference extends to occupants who are without tenure or hold only minor fractional interests, whose privileges can be terminated at any time without notice, would be to frustrate the intent of the law to achieve order and stability.

Schultz does not control the land on which he bases his claim of preference, and one who does not control his preference land can not be considered "a lawful occupant of contiguous land," as that term is used in 43 U.S.C. § 315m (1970). *Laurence A. Andren*, 7 IBLA 14 (1972), and cases cited therein.

43 CFR 4125.1-1(i) (4) requires:

The grazing lease will be terminated in whole or in part because of loss of control by the lessee of non-Federal lands that have been recognized as the basis for a grazing lease.

As between conflicting applicants for a section 15 lease, if only one of the applicants owns adjoining land, an award must be made to him if he needs the public land for proper use of his contiguous land, even though the applicant who does not own contiguous land may have a greater need for the public land. *E. W. Davis*, A-29889 (March 25, 1964).

Because Schultz does not control his preference land and in light of the requirements of the regulation set out above, we hold that the lease must be awarded to the Grabberts, who are the only remaining preference applicants for the disputed area.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision is reversed.

EDWARD W. STUEBING, *Member*.

WE CONCUR:

DOUGLAS E. HENRIQUES, *Member*.

FREDERICK FISHMAN, *Member*.

ESTATE OF JOSEPH RED EAGLE

2 IBIA 43

Decided July 30, 1973

Appeal from the Judge's decision denying the validity of Last Will and Testament leaving decedent's entire estate to the appellant.

Reversed and remanded.

105.1 Indian Probate: Administrative Procedure: Applicability to Indian Probate

The requirement of the Administrative Procedure Act, that all decisions of a Judge shall include a statement of findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record, is mandatory and applicable to all decisions of Judges in Indian probate proceedings.

105.2 Indian Probate: Administrative Procedure: Official Notice, Record

Official notice of documents and records will not be taken unless they are introduced in evidence or unless an order or stipulation provides to the contrary.

370.0 Indian Probate: Rehearing: Generally

A rehearing will be granted where the original hearing did not conform with the standards of a full opportunity to be heard embodied in the Administrative Procedure Act (5 U.S.C. §§ 554 and 556 (1970)).

APPEARANCES: Walter B. Dauber, Esq., of Tonkoff, Dauber & Shaw, for appellant; Joseph A. Esposito, Esq., of Dellwo, Rudolf & Grant, for appellee.

OPINION BY MESSRS. McKEE AND SABAGH INTERIOR BOARD OF INDIAN APPEALS

The probate of the estate of Joseph Red Eagle, an unenrolled and unallotted Osage Indian of the State of Oklahoma, was the subject of a hearing, held on September 3, 1971. The Administrative Law Judge, Indian Probate, denied the validity of a purported last will and testament dated August 21, 1957, leaving decedent's entire estate to Hobart B. Bowlby, a non-Indian, because of the legal incompetency of the decedent and because the relationship of the devisee to the decedent was of such a confidential and fiduciary nature as to raise a presumption of undue influence, which was not sufficiently rebutted. Consequently, the Judge ordered that a previous will dated September 2, 1952, be approved as a "self-proved" will leaving the entire trust estate to Felix A. Aripa, "nephew" of the decedent.

A petition for rehearing was denied on June 1, 1972, and Hobart

Bowlby appealed on July 11, 1972, for the following reasons:

1) Erroneous findings that Joseph Red Eagle was incompetent prior to and at the date of the Last Will and Testament dated August 21, 1957;

2) The finding that the relationship of Hobart Bowlby to Joseph Red Eagle was of a confidential and fiduciary nature so as to raise a presumption of undue influence;

3) Placing the burden upon Hobart Bowlby to produce evidence that the will represented the uncontrolled acts of the testator;

On the basis of the record we are unable to determine if appellant's contentions are correct.

In this case there appears to have been a complete breakdown in administrative due process. A hearing was held on September 3, 1971. The appellant, Hobart B. Bowlby, appeared in person and by counsel being fully aware of the existence of the will dated August 21, 1957, wherein he was named as sole devisee. Felix Aripa appeared without counsel, and apparently both parties were completely unaware of the existence of the will dated September 2, 1952, wherein Felix Aripa was named as sole devisee. The only two witnesses who appeared and were examined were the will devisees. The examination was conducted solely by the Judge who concluded the hearing with:

This matter will be continued to Portland without renote for further information and hearing. (Tr. 32.)

During the hearing the examination of Mr. Bowlby touched briefly upon his appointment as guardian

of the testator, but there was no mention made of a pre-existing indebtedness to Mr. Bowlby or a number of other matters which are enumerated by the Judge in his Memorandum Opinion and his Order On Wills issued March 10, 1972. In addition to the transcript of the September 3, 1971 hearing, the record now includes: copies of certain testimony received in the probate of the *Estate of Mary Magdeline Davenport Red Eagle*; a great number of documents purportedly pertaining to the guardianship proceedings conducted over the years by Mr. Bowlby as guardian for the testator; and certain documents from the Bureau of Indian Affairs pertaining to the testator's income and management of his trust funds during the guardianship. No further hearing had been held, and there was no indication that the documents in question have ever been presented to or considered by either of the interested parties or their counsel. No single one of these documents was marked for identification at any hearing or admitted in evidence. See *Estate of Julius Benter*, 1 IBIA 59 (January 12, 1971) and in *Estate of Greybull*, IA-D-2 (September 7, 1966).

The will dated September 2, 1952, was approved without supporting testimony. Attached to the will are three affidavits, one by the testator, a joint affidavit of the two will witnesses and the affidavit of the scrivener all dated the same day as the will. The Judge makes no finding of the adequacy of the affidavits

or other facts which would bring the will within the provisions of 43 CFR 4.233(a). This section contains the following provision:

If uncontested, a self-proved will may be approved and distribution ordered thereunder with or without the testimony of any attesting witnesses. (Italics supplied.)

The Judge ruled by inference that the existence of a later will, i.e., the will dated August 21, 1957, does not constitute a contest against the earlier 1952 will. We cannot ignore the fact that there are two contending proponents of separate wills which is an inappropriate situation for the application of the permissive portion of the regulation. Nothing in the record suggests that the will witnesses or others are unavailable.

Moreover, the record does suggest that if both wills were to be disapproved, a possibility may exist that the estate will escheat to the tribe under 25 U.S.C. § 373a (1970). It is conceivable that the tribe may be a party in interest entitled to notice of further proceedings.

A rehearing should have been granted in any event to complete the record, and to examine in depth, far beyond the extent of the examination conducted on September 3, 1971, as to the actual circumstances surrounding the execution of the wills and the testamentary capacity etc. of the testator at the time each will was executed.

The Judge made no findings of fact, as such. This proceeding is for the "determination of adjudicatory

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facts" as they are defined and discussed in *Wood County Bank v. Camp*, 348 F. Supp. 1321 (D.C. D.C. 1972). In that case the Comptroller of Currency issued an order in which there were no findings of fact, and the case was remanded to him by the court for further proceedings including the issuance of an order which would conform to the requirement set forth by Mr. Justice Cardozo in *United States v. Chicago, Milwaukee, St. Paul and Pacific R. Co.*, 294 U.S. 499, 511 (1935).

* * * We must know what a decision means before the duty becomes ours to say whether it is right or wrong.

This Board took a like view in the *Estate of Lucille Mathilda Callous Leg Ireland*, 78 I.D. 66 (1971), issued prior to *Wood County Bank, supra*, where we said:

Findings of fact and conclusions of law, should be clearly and succinctly incorporated in every examiner's decision in order to show the factual and legal support for the result reached. Our regulation, 25 CFR 15.15, not only requires this, but it was held in *Estate of Charles White*, 70 I.D. 102, that Indian probate adjudications fall within the provisions of the Administrative Procedure Act. The pertinent part of that act, 5 U.S.C.A. sec. 557, provides:

(c) * * * All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefore, on all material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction relief, or denial thereof.

There is no indication in the record that any investigation had been

made concerning the testator's possible ownership of inherited restricted interests in Osage land in Oklahoma, or of his possible inherited interests in an Osage head-right or a fractional part thereof. If it is established that the testator was of Osage blood, but unenrolled, then the interests which he owned on the Coeur d'Alene Reservation and any head-right interest which he might have shall be regarded as trust property over which the Judge has probate jurisdiction in this estate.

On the basis of the record before us the finding that Felix A. Aripa and Lucy Sanchez are the decedent's nephew and niece and the conclusion that they are heirs at law are both patently in error. The Judge said in his decision, "Decedent * * * died * * * on the 29th day of August 1969 * * * leaving surviving certain heirs at law * * * Felix Aripa, nephew, Lucy Sanchez, niece * * *" entitled to a one-half of the estate each. However, the transcript refutes that relationship attributed to the parties.

Q. Mr. Aripa, you were, were you not, the nephew of Joseph Red Eagle's wife Magdoline Davenport Red Eagle?

A. Correct.

(Tr. 1)

* * * Q. * * * What relationship did you bear to Mrs. Red Eagle?

A. Well, she'd be my aunt, that is my father's youngest sister.

(Tr. 2)

* * * Q. Your father was the brother of . . .

A. Mary Magdoline.

Q. What was your father's name?

A. Stanislaus.

(Tr. 9)

* * * *

Q. Do you have any brothers and sisters?

A. Yes, I have a sister Lucy, Lucy Sanchez.

* * * *

Q. Mary and your father were brother and sister?

A. Yes, they are, yes.

(Tr. 10)

Under the laws of descent in force in the State of Idaho at the decedent's death on August 29, 1969, Felix Aripa and Lucy Sanchez could not be heirs of the decedent as they were not of his blood. They were related to him by marriage only.

We find that the record is incomplete, and that a proper determination cannot be made on the evidence before us.

Therefore, we remand this case to the Administrative Law Judge for a hearing de novo, which shall include inter alia, proper notification of all interested parties, a transcript incorporating all relevant testimony and documentary evidence admitted at the hearing and a decision including therein, findings of fact and conclusions of law. See 5 U.S.C. § 557 (a) (3) (1970).

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, we REVERSE the Order Denying the Petition for Rehearing and REMAND the matter to the

Administrative Law Judge for hearing de novo to determine heirs, to approve or disapprove wills and to determine creditors rights, if any.

DAVID J. MCKEE, *Chairman.*

MITCHELL J. SABAGH, *Member.*

UNITED STATES

v.

KOSANKE SAND CORPORATION (ON RECONSIDERATION)

12 IBLA 282

Decided August 3, 1973

Reconsideration of Board decision of September 3, 1971, 3 IBLA 189, which reversed in part a decision of Administrative Law Judge Graydon E. Holt, dated September 16, 1970.

Board decision of September 3, 1971, set aside and case remanded.

National Environmental Policy Act— Mining Claims: Contests—Mining Claims: Patents

It is not necessary for the Government to prepare an environmental impact statement before issuing a patent to a mining claim, as the patenting of a mining claim is not a "major Federal action" within the ambit of section 102 of the National Environmental Policy Act, 42 U.S.C. § 4332 (1970).

Mining Claims: Discovery: Generally— Mining Claims: Hearings— Rules of Practice: Hearings

The Board of Land Appeals will set aside its former decision and remand a contest proceeding for further hearing where on reconsideration of such decision it finds additional evidence is necessary for a final determination.

(ON RECONSIDERATION)

August 3, 1973

APPEARANCES: Steven P. Kosanke, for the contestee; Charles P. Eddy, Esq., Office of the Solicitor, United States Department of the Interior, Washington, D.C., and E. Kendall Clarke, Esq., Field Solicitor, United States Department of the Interior, San Francisco, California for the contestant; Donn L. Black, Esq., of Orr, Wendel & Lawlor, Oakland, California, for the East Bay Regional Park District; Victor Westman, Esq., Deputy County Counsel of Contra Costa County for Contra Costa County; Michael W. Palmer, Esq., of Berkeley, California for the Environmental Defense Fund and the California Native Plant Society; Robert B. Morrill, Esq., of Petty, Andrews, Olsen, Tufts, Jackson & Sander, San Francisco, California; Beatrice Challis Laws, Esq., of San Francisco, California, and James W. Moorman, Esq., of San Francisco, California, for the Sierra Club; and Howard A. Twitty, Esq., of Twitty, Sievewright, & Mills, Phoenix, Arizona, for the American Mining Congress.

OPINION BY MR. FRISHBERG
INTERIOR BOARD OF LAND
APPEALS

On September 3, 1971, the Board of Land Appeals, in *United States v. Kosanke Sand Corporation*, 3 IBLA 89, 78 I.D. 285, reversed a decision of Administrative Law Judge Graydon E. Holt,¹ dated

September 16, 1970, which had held null and void for lack of a discovery the N $\frac{1}{2}$ of Earache No. 2, Earache Nos. III and 5, Pete, and the N $\frac{1}{2}$ of Jeff placer mining claims embracing the N $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$, N $\frac{1}{2}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$ NW $\frac{1}{4}$, N $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$, sec 8, T. 1 N., R. 1 E., M.D.M., California. The Judge had premised his decision on the failure of the contestee to demonstrate the marketability of the silica sands for which the claims were located. The Board reversed, holding that while the Government had presented a prima facie case as to the invalidity of the claims, the contestee had presented sufficient evidence so as to meet its burden of proof. Subsequently the contestant and other parties petitioned for reconsideration of the Board's decision and submitted briefs in support of their petitions. On May 15, 1972, oral argument was held before the Board sitting en banc. Having carefully considered all aspects of the case, it is the decision of the Board that the opinion of September 3, 1971, be vacated, and that the case be remanded for further hearing.

We take this action with reluctance. Additional proceedings will entail time and money. Yet the Department is required, before issuance of a patent, to examine each claim "to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved." *Cameron v. United States*, 252 U.S. 450, 460 (1920). We are thus obliged to de-

¹ The change of title of the hearing officer from "Hearing Examiner" to "Administrative Law Judge" was effectuated pursuant to order of the Civil Service Commission, 37 F.R. 16787 (August 19, 1972).

termine, with as great a degree of certitude as is possible, whether a discovery of a valuable mineral deposit has been made on these claims. On the record before us, we find that such a determination is impossible. Before a final decision can be made a new hearing must be held to elicit evidence on various factors, which shall be set out below.

Following our initial decision, a number of parties which had not formerly participated in the case petitioned for leave to file briefs in support of the Government's petition for reconsideration. These were the East Bay Regional Park District, Contra Costa County, the Environmental Defense Fund, Inc., the California Native Plant Society, and the Sierra Club.² They were granted permission to participate as amici curiae. These parties, in addition to alleging a lack of discovery on the contestee's part, argued that the National Environmental Policy Act [NEPA], 42 U.S.C. §§ 4321 *et seq.* (1970), requires the filing of an environmental impact statement. They also contended that NEPA and the General Mining Act of 1872, 30 U.S.C. §§ 21-54 (1970), require that the land be chiefly valuable for the mineral therein as a prerequisite to discovery.

We hold that the law does not require the preparation of an environmental impact statement in the case before us. Section 102 of NEPA, 42

² The American Mining Congress filed an amicus brief in opposition to the environmental position espoused by the other amici curiae and appeared at the oral argument.

U.S.C. § 4332, provides in pertinent part that—

* * * [T]o the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall:

* * * * *

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

The Guidelines issued by the Council on Environmental Quality,³ a federal agency established under section 202 of the Act, provide:

* * * The phrase "to the fullest extent possible" in section 102(2)(C) is

³ Council on Environmental Quality, Statements on Proposed Federal Actions Affecting the Environment, Guidelines, 36 F.R. 7724 (April 23, 1971). Issuance of the Guidelines to federal agencies for guidance in preparation of environmental impact statements was directed by Exec. Order No. 11514 § 3(h), 3 CFR 526, 42 U.S.C. § 4321 (1970). Although the Guidelines do not have the effect of a statute or regulation, they are nevertheless to be accorded "great deference [as] the interpretation given the statute by the officers or agency charged with its administration." *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

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meant to make clear that each agency of the Federal Government shall comply with the requirement *unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible*. (Section 105 of the Act provides that "The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies.") ⁴ *Guideline No. 4, 36 F.R. 7724 (April 23, 1971)*. (Italics added.)

It is our conclusion that "existing law applicable to the agency's operations," *viz.*, the General Mining Act of 1872, *as amended, supra*, under which the claims herein involved were located, and which opens to location and purchase, "[e]xcept as otherwise provided, all valuable mineral deposits in lands belonging to the United States, * * * and the lands in which they are found * * *," 30 U.S.C. § 22 (1970), "makes compliance impossible."

* * * The purpose of the new language [i.e., "to the fullest extent possible"] is to make it clear that each agency of the Federal Government shall comply with the directives set forth in such subparagraphs (A) through (H) [of clause (2) of section 102] unless the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible. If such is found to be the case, then compliance with the particular directive is not immediately required. However, as to other activities of that agency, compliance is required. * * * H.R. REP. NO. 91-765, 91st Cong., 1st Sess. 9 (1969).

In *Calvert Cliffs' Coordinating Committee, Inc. v. AEC*, 449 F.2d 1109 (D.C. 1971), the court stated:

"Thus the Section 102 duties are not inherently flexible. They must be complied with to the fullest extent, unless there is a clear conflict of statutory authority. Considerations of administrative difficulty, delay or economic cost will not suffice to strip the section of its fundamental importance." *Id.* at 1115 (footnote omitted).

This comports with the position of the Department when it reported in 1971 to the Council on Environmental Quality that the General Mining Act of 1872 "do[es] not admit of environmental considerations."⁵

⁵ Section 103 of the NEPA (42 U.S.C. § 4333) provides:

"All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this chapter and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this chapter."

In compliance with this mandate, the Deputy Solicitor, Department of the Interior, in a letter to the Chairman, Council on Environmental Quality, dated July 1, 1971, stated:

"On September 1, 1970, we submitted a report under section 103 of the National Environmental Policy Act. This letter is intended to supplement that report insofar as it pertains to the agency jurisdiction of the Bureau of Land Management (BLM).

* * * * *

"The so-called location and settlement laws leave BLM without authority to consider environmental factors in their administration. In Alaska particularly, the homestead settlement laws [43 U.S.C. § 270 (1970)], the native allotment law [Acts of May 17, 1906, c. 2469, 34 Stat. 197, and August 2, 1956, c. 891, 70 Stat. 954, repealed by Act of December 18, 1971 (Alaska Native Claims Settlement Act), § 18(a), 43 U.S.C.A. § 1617 (a) (1973)], and the purchases authorized for headquarters, trade and manufacturing or homesites [43 U.S.C. §§ 687a to 687a-6 (1970)] permit entry without prior approval of the BLM. A similar situation arises throughout the United States under the mining laws (30 U.S.C. § 21 *et seq.*). The Department has no control over entries made pursuant to these laws and the basic statutes under which the entries are made do not admit of environmental considerations. New legislation is required, and the Department has consistently recommended such legislation." (Italics added.)

The discovery of a valuable mineral deposit within its limits validates a mining claim located on public land in conformance with the statute, and its locator acquires an exclusive possessory interest in the claim, a form of property which can be sold, transferred, mortgaged, or inherited, without infringing the paramount title of the United States. 30 U.S.C. § 26 (1970); *Wilbur v. Krushnic*, 280 U.S. 306, 316 (1930); *Cole v. Ralph*, 252 U.S. 286, 295 (1920); *Forbes v. Gracey*, 94 U.S. 762, 767 (1877). Such an interest may be asserted against the United States as well as against third parties, *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336 (1963); *Gwillim v. Donnellan*, 115 U.S. 45, 50 (1885), and may not be taken from the claimant by the United States without due compensation. See *United States v. North American Transportation & Trading Co.*, 253 U.S. 330 (1920); cf. *Best v. Humboldt Placer Mining Co.*, *supra*. The holder of a valid mining claim has the right, from the time of location, to extract, process and market the locatable mineral resources thereon.

Upon satisfaction of the requirements of the statute, the holder of a valid mining claim has an absolute right to a patent from the United States conveying fee title to the land within the claim, and the actions taken by the Secretary of the Interior in processing an application for patent by such claimant are not

discretionary; issuance of a patent can be compelled by court order. *Wilbur v. Krushnic*, *supra*, at 318-19; *Roberts v. United States*, 176 U.S. 221, 231 (1900). The patent may contain no conditions not authorized by law. *Deffeback v. Hawke*, 115 U.S. 392, 406 (1885).⁶ The claimant need not, however, apply for patent to preserve his property right in the claim, but may if he chooses continue to extract and freely dispose of the locatable minerals until the claim is exhausted, without ever having acquired full legal title to the land. *Union Oil Co. of California v. Smith*, 249 U.S. 337, 348-49 (1919); *United States v. Carlile*, 67 I.D. 417, 421 (1960).⁷ The patent, if issued, conveys fee simple title to the land within the claim, but does nothing to enlarge or diminish the claimant's right to its locatable mineral resources.

In order that an environmental impact statement be required under NEPA, there must be contemplated "major Federal action(s) significantly affecting the quality of the

⁶ " * * * The patent of a mining claim carries with it such rights to the land which includes the claim as the law confers, and no others, and these rights can neither be enlarged nor diminished by any reservations of the officers of the Land Department, resting for their fitness only upon the judgment of those officers. * * * " *Davis's Administrator v. Weibbold*, 139 U.S. 507, 528 (1891).

⁷ " * * * The owner is not required to purchase the claim or secure patent from the United States; but so long as he complies with the provisions of the mining laws, his possessory right, for all practical purposes of ownership, is as good as though secured by patent. * * * " *Wilbur v. Krushnic*, *supra*, at 317.

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human environment." ⁸ The statement is to be provided as part of a recommendation or report on a

⁸ "A 'major federal action' is one that requires substantial planning, time, resources or expenditure. Clearly the NEPA contemplates some federal actions which are minor, or have so little environmental impact, as to fall outside its scope."

"A federal action 'significantly affecting the quality of the human environment' is one that has an important or meaningful effect, directly or indirectly, upon any of the many facets of man's environment. *Natural Resources Defense Council, Inc. v. Grant*, 341 F. Supp. 1356, 367 (E.D. N.C. 1972). The phrase must be broadly construed to give effect to the purposes of the NEPA. A ripple begun in one small corner of an environment may become a wave threatening the quality of the total environment. Although the thread may appear fragile, if the actual environmental impact is significant, it must be considered. * * * *Citizens Organized To Defend the Environment, Inc. v. Volpe*, 353 F. Supp. 520, 540 (D.C.S.D. Ohio 1972).

The following are examples of "major Federal actions" for which environmental impact statements have been required:

Decisions of the Secretary of Transportation involving federal-aid highway projects:

Monroe County Conservation Council v. Volpe, 472 F.2d 693 (2d Cir. 1972); *Scherr v. Volpe*, 466 F.2d 1027 (7th Cir. 1972); *Brooks v. Volpe*, 460 F.2d 1193 (9th Cir. 1972); *Arlington Coalition on Transportation v. Volpe*, 458 F.2d 1323 (4th Cir.), cert. denied, 409 U.S. 1000 (1972); *Lathan v. Volpe*, 455 F.2d 1111 (9th Cir. 1972); *Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dep't*, 446 F.2d 1013 (5th Cir. 1971); *Stop H-3 Ass'n v. Volpe*, 353 F. Supp. 14 (D. Hawaii 1972); *Keith v. Volpe*, 352 F. Supp. 1324 (C.D. Cal. 1972); *Daly v. Volpe*, 350 F. Supp. 252 (W.D. Wash. 1972); *Conservation Soc'y of Southern Vermont v. Volpe*, 343 F. Supp. 761 (D. Vt. 1972); *Morningside-Lenox Park Ass'n v. Volpe*, 334 F. Supp. 132 (N.D. Ga. 1971); *Nolop v. Volpe*, 333 F. Supp. 1364 (S.D.S.D. 1971); *Harrisburg Coalition Against Ruining the Environment v. Volpe*, 330 F. Supp. 918 (M.D. Pa. 1971).

Construction of the Trinity River Basin Project:

Sierra Club v. Froehke, No. 71-H-983 (S.D. Tex., filed February 16, 1973) [5 ERC 1033].

Construction of the Tennessee-Tombigbee Waterway:

Environmental Defense Fund v. Corps of

proposal to implement such action. It has been held that the statement is not to be merely advisory in nature, but that the environmental

Engineers, 331 F. Supp. 925 (D.D.C. 1971).

Construction of the Cross-Florida Barge Canal:

Environmental Defense Fund v. Corps of Engineers, 324 F. Supp. 878 (D.D.C. 1971).

Construction of dam project:

Environmental Defense Fund v. TVA, 468 F.2d 1164 (6th Cir. 1972); *Conservation Council of North Carolina v. Froehke*, 340 F. Supp. 222 (M.D.N.C. 1972).

Channelization of river bed:

Natural Resources Defense Council v. Grant, 341 F. Supp. 356 (E.D.N.C. 1972); *Akers v. Resor*, 339 F. Supp. 1375 (W.D. Tenn. 1972).

Dredging of New Haven, Conn., harbor and dumping of dredged materials in Long Island Sound:

Sierra Club v. Mason, 351 F. Supp. 419 (D. Conn. 1972).

Construction of coal-fired electric generating plants:

Jicarilla Apache Tribe of Indians v. Morton, 471 F.2d 1275 (9th Cir. 1973).

Nuclear test on Amchitka Island, Alaska: *Committee, Inc. for Nuclear Responsibility v. Seaborg*, 463 F.2d 783 (D.C. Cir. 1971).

Simulated nuclear test on atoll in Pacific Trust Territories:

People of Enewetak v. Laird, 353 F. Supp. 811 (D. Hawaii 1973).

Federally financed downtown urban renewal project:

Businessmen Affected by the Yearly Action Plans, Inc. (BASYAP) v. D.C. City Council, 339 F. Supp. 793 (D.D.C. 1972).

Federally funded waterfront rehabilitation project involving destruction of buildings of alleged historical value:

Boston Waterfront Residents Ass'n v. Romney, 343 F. Supp. 89 (D. Mass. 1972).

Federally-funded state prison reception and medical center:

Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971).

Federal loan for construction of 16-story, 221-unit apartment building:

Goose Hollow Foothills League v. Romney, 334 F. Supp. 877 (D. Ore. 1971).

Approval by National Capital Planning Commission of private redevelopment project in District of Columbia:

McLean Gardens v. National Capital Planning Comm'n, No. 2042-72 (D.D.C., filed October 21, 1972) [4 ERC 1708].

License to construct nuclear power facility: *Calvert Cliffs' Coordinating Committee, Inc.*

considerations set forth therein must be a factor in the agency's decision whether or in what form to carry out the proposed action. *Calvert Cliffs' Coordinating Committee, Inc. v. AEC*, 449 F.2d 1109, 1117-18 (D.C. Cir. 1971). The statement must discuss, *inter alia*, "alter-

v. AEC, 449 F.2d 1109 (D.C. Cir. 1971); *Isaiah Walton League of America v. Schlesinger*, 337 F. Supp. 287 (D.D.C. 1971).

License to construct pumped storage electric power plant:

Scenic Hudson Preservation Conference v. FPC, 453 F.2d 463 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972).

License to construct high-voltage electric power transmission line:

Greene County Planning Board v. FPC, 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972).

Permit under Rivers and Harbors Act to construct water intake and discharge facility:

Citizens for Clean Air, Inc. v. Corps of Engineers, 349 F. Supp. 696 (S.D.N.Y. 1972).

Permit under Refuse Act to discharge refuse or treated waste water into navigable body of water:

Sierra Club v. Sargent, Civil No. 249-71C2 (W.D. Wash., filed March 16, 1972) [3 ERC 1905]; *Kalur v. Resor*, 335 F. Supp. 1 (D.D.C. 1971).

Permission by Interstate Commerce Commission to abandon short-line freight railroad serving New York Harbor traffic:

City of New York v. United States, 337 F. Supp. 150 (E.D.N.Y. 1972).

Federally imposed plan for control of emissions of sulphur oxides from copper smelter:

Anaconda Co. v. Ruckelshaus, 352 F. Supp. 697 (D. Colo. 1972).

Termination by Secretary of the Interior of contracts for extraction and sale of helium awarded under National Helium Act:

National Helium Corp. v. Morton, 455 F.2d 650 (10th Cir. 1971).

Award by Secretary of the Interior of offshore oil leases to 80 tracts of submerged land, primarily off eastern Louisiana:

Natural Resources Defense Council v. Morton, 458 F.2d 827 (D.C. Cir. 1972).

Approval by Secretary of the Interior of lease by Indian pueblo of lands on Indian reservation held in trust by the United States:

Davis v. Morton, 469 F.2d 593 (10th Cir. 1972), *rev'g*, 335 F. Supp. 1258 (D.N.M. 1971).

A common element which distinguishes the "major Federal actions" described above from the issuance of a patent to a valid mining claim is that in each instance cited there existed an area in which the federal agency

natives to the proposed action."⁹ The plain meaning of the statutory language connotes an action proposed to be taken by a federal agency which is discretionary in character and to which there may exist a viable alternative. It is difficult to perceive how the possible issuance of patent in the case before us can fall within the designated category. The action taken to perfect a claim and apply for patent, although authorized and prescribed by law, is in no sense a federal action. The location of the claim,

involved was free to exercise discretion. After having accorded full weight to environmental factors the agency was empowered to render the final administrative decision on, e.g., the route, design, or method of construction of a highway or a waterways project, or portion thereof, the scope and design of a federally funded rehabilitation project, or whether or not or under what conditions to grant a license, permit, loan, or lease. In no case which we have been able to find has a court characterized the performance of a ministerial duty as a "major Federal action(s)."

⁹ In *Natural Resources Defense Council, Inc. v. Morton*, *supra*, note 8, a case involving the discretionary authority of the Secretary of the Interior to award offshore oil leases, it was held that the agency must consider all alternatives reasonably available, not necessarily limited to those measures which it is empowered to adopt. The court pointed out:

"The mere fact that an alternative requires legislative implementation does not automatically establish it as beyond the domain of what is required for discussion, particularly since NEPA was intended to provide a basis for consideration and choice by the decision-makers in the legislative as well as the executive branch. But the need for an overhaul of basic legislation certainly bears on the requirements of the Act. We do not suppose Congress intended an agency to devote itself to extended discussion of the environmental impact of alternatives so remote from reality as to depend on, say, the repeal of the anti-trust laws." *Id.* at 837.

To the ministerial act of issuance of a patent to a valid mining claim there exists no alternative. Even a complete overhaul of the General Mining Act of 1872 would have no effect on claims located before the effective date of the new legislation.

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the exploration leading to discovery, the performance of the annual assessment work, and the compliance with the procedural provisions of the statute are all performed by the claimant. Once the statutory requirements have been met, the Secretary has no alternative but to issue patent.

While the decision-making process in determining the existence of a discovery involves an exercise of judgment, it is not discretionary in the ordinary sense. *Wilbur v. Krushnic*, *supra*, pp. 306, 318-19. Discretionary authority implies the absence of fixed rules.¹⁰ Such authority is vested in the Secretary in granting oil or mineral leases¹¹ and in issuing patents under certain statutes.¹² In these cases, which do not involve property rights, the Secretary may weigh the effect of leases or patents against the public interest and grant or deny them accordingly, even though the applications meet all other statutory and regulatory requirements.

The Secretary has no such discretionary authority in determining whether a discovery exists and a patent should issue. It has been the

consistent position of the courts and this Department that because a mining claim is an interest in and a claim to property, it may not be declared invalid except in accordance with due process. *Cameron v. United States*, 252 U.S. 450 (1920); *United States v. O'Leary*, 63 I.D. 341 (1956). Due process means more than notice and opportunity for hearing. It requires the application of fixed, objective rules to facts. *See Wilbur v. Krushnic*, *supra*. In that case the Secretary was ordered by a writ of mandamus to apply the pertinent statute as interpreted by the Court to the application for patent.¹³

It has been argued herein that even assuming a patent must issue, the filing of an environmental impact statement by the Department of the Interior is nevertheless required by NEPA as a condition precedent to such issuance for informational purposes. We cannot accept this contention. NEPA intends that Congress and the general public be kept informed of major federal actions and the effects thereof. As we have already stated, however, the issuance of a law is not a major federal action within the meaning of NEPA. Moreover, to condition the full enjoyment of an existing right upon the filing of an informational

¹⁰ See cases collected at 12A *Words and Phrases*, 327-355, App. 52.

¹¹ *E.g.*, *Udall v. Tallman*, 380 U.S. 1 (1965); *Duesing v. Udall*, 350 F.2d 748 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 912 (1966); *Haley v. Seaton*, 281 F.2d 620 (D.C. Cir. 1960); some statutory grants of secretarial discretion are at 30 U.S.C. §§ 189, 201, 209, 211, 226.

¹² *E.g.*, 43 U.S.C. § 1171; *Lewis v. Udall*, 374 F.2d 180 (9th Cir. 1967); *Ferry v. Udall*, 336 F.2d 706 (9th Cir. 1964); *Willowson v. United States*, 313 F.2d 884 (D.C. Cir. 1963); *Jack H. Stockstill*, 1 IBLA 278 (1971).

¹³ While the Court's interpretation of the statute in *Krushnic* was modified in *Hickel v. Oil Shale Corp.*, 400 U.S. 48 (1970), the proposition for which *Krushnic* is cited herein, namely, the limited latitude of the Secretary in applying the mining laws, subject to court order, was not before the Court in *Hickel* and, hence, not affected by the latter.

statement by the executive branch of the federal government, the adequacy of which statement is subject to attack by third parties and ultimate determination by the courts,¹⁴ would seriously impair that right. Such proceedings might take years, and the mining claimant, whose right to full enjoyment is being enjoined, would be almost helpless to hasten the process.

Nowhere in NEPA or its legislative history does it appear that Congress intended such an effect upon the rights of private individuals. Where Congress has amended the mining laws by excluding certain minerals from location, it has consistently recognized the need to preserve property rights by excepting valid existing claims from the operation thereof.¹⁵ We do not believe that it intended to do otherwise when enacting the National Environmental Policy Act.

As noted above, a claimant need not obtain full legal title to the land in order to retain the right to extract and dispose of the locatable minerals until they are exhausted. *Wilbur v. Krushnic*, *supra*; *Union City Oil Co. v. Smith*, *supra*; *United States v. Carlile*, *supra*. From this

it might be argued that delay in issuance of a patent would cause the owner of a valid claim no real injury. But this argument illustrates the fatal defect in the proposition that NEPA requires the filing of an environmental impact statement before patent can issue. For the real environmental issue is not legal title to the claim, but the impact of the mining operation upon the environment. To the extent that the mining laws give to individuals the right to enter the public domain, to locate claims thereon, to discover minerals therein, and to extract and remove those minerals therefrom, all without prior approval of the United States, the development of a mining claim cannot be tortured into "Federal action," major, minor or otherwise.

That the Secretary is not required to file an environmental impact statement as a condition precedent to issuance of patent does not foreclose consideration of environmental costs in the resolution of the issue before us: whether each of the claims is in fact valid by reason of the discovery of a valuable mineral deposit within its limits. To the extent federal, state, or local law requires that anti-pollution devices or other environmental safeguards be installed and maintained as part of the processes of extraction and beneficiation of the minerals contained in the claims, the expenditures made necessary by such protective measures may properly be considered in connection with the issue of marketability, as part of the costs in deter-

¹⁴ *E.g.*, *Natural Resources Defense Council v. Morton*, 458 F.2d 827 (D.C. Cir. 1972); and see other cases cited above at note 8. According to Timothy Atkeson, General Counsel, Council on Environmental Quality, fifty governmental actions are presently enjoined pending compliance with NEPA. See his statement before the Subcommittee on the Environment of the Senate Committee on Commerce on April 5, 1973, at 8.

¹⁵ *E.g.*, § 37 of the Mineral Leasing Act of 1920, 41 Stat. 451, 30 U.S.C. § 193 (1970); § 7 of the Common Varieties Act of 1955, 69 Stat. 372, 30 U.S.C. § 615 (1970).

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mining whether appellant has a reasonable prospect of success in developing a valuable mine within the claims.

As regards the second point relating to whether a comparison of values prior to the issuance of a patent is required, the applicable laws recognize no such test. In early cases involving the application of the mining laws, the Department was faced with numerous private contests between agricultural entrymen and mineral claimants as to whether the land in issue was mineral or non-mineral in character. See, e.g., *Castle v. Womble*, 19 L.D. 455 (1894); *Magruder v. Oregon and California R.R. Co.*, 28 L.D. 174 (1899). These cases focused on the comparative value of the lands involved for mining as opposed to agricultural purposes. They seemed to apply precisely the balancing approach advocated by amici curiae. In *Cataract Gold Mining Co.*, 43 L.D. 248 (1914), however, the Department was confronted by a case within which it was alleged that regardless of whether minerals existed in such quantity and of such quality as would meet the prudent man rule of *Castle v. Womble*, *supra*, the land was still more valuable for the development of electrical power. The Department examined the law and noted that while many earlier decisions had apparently utilized a balancing of values approach, those decisions had actually been premised on the belief "that the land in-

volved possessed a positive or greater value for the purposes for which the award was made and no practical or commercial value for the purposes for which patent was denied." *Id.* at 252. The Department then expressly held that:

* * * if a mineral claimant is able to show that the land contains mineral of such quantity and value as to warrant a prudent man in the expenditure of his time and money thereupon, in the reasonable expectation of success in developing a paying mine, such lands are disposable only under the mineral laws, notwithstanding the fact that they may possess a possible or probable greater value for agriculture or other purposes.

Id. at 254. Cited with approval in *United States v. Langmade and Mistler*, 52 L.D. 700, 705 (1929).

A useful comparison can be made between the Act of May 10, 1872, 17 Stat. 91, *as amended*, 30 U.S.C. § 22 (1970), under which the claims were located in the instant case, and the Act of August 4, 1892, 27 Stat. 348, 30 U.S.C. § 161 (1970), relating to building stone. Section 1 of the Act of 1872, *as amended*, provides:

Except as otherwise provided, *all* valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States * * * [Italics added]

30 U.S.C. § 22.

Section 1 of the Act of 1892 provides:

Any person authorized to enter lands under the mining laws of the United

States may enter lands that are *chiefly valuable* for building stone under the provisions of the law in relation to placer mineral claims. * * * [Italics added]

30 U.S.C. § 161.

The Act of 1872 contains no language that admits of limitation on the location of claims, save that they must be for valuable mineral deposits. The Act of 1892, relating to building stone, however, requires as an additional prerequisite for a valid claim for building stone that the lands embraced within such claims must be chiefly valuable for the located mineral. Therein, Congress has expressly mandated a comparison of values approach. But it is equally clear that Congress has chosen not to amend the Act of 1872 to the effect that *all* claims must embrace lands chiefly valuable for located minerals. We do not believe that anything in NEPA would hint that Congress intended so drastic a revision. Nor have the amici curiae pointed to anything in the legislative history of the Act that would justify such a reading of the statutory language. Accordingly, we hold that under the Act of May 10, 1872, *supra*, if the discovery of a valuable mineral deposit be shown, a valid claim exists, regardless of a more beneficial use to which the land might be put. See *United States v. Iron Silver Mining Co.*, 128 U.S. 673, 684 (1888).

While the existence of other values does not qualify the locator's rights under the mining law if he has a valid claim, it may be a factor in determining whether a valid claim exists. It may be considered

in assessing the weight and credibility to be accorded the locator's testimony in determining whether a discovery has been made. *Helen V. Wells*, 54 I.D. 306, 309 (1933); *E. M. Palmer*, 38 L.D. 294 (1909). And it may be an issue in evaluating his bona fide intention to develop a mining operation. As the Court stated in *United States v. Coleman*, 390 U.S. 599, 602 (1968):

* * * Under the mining laws Congress has made public lands available to people for the purpose of mining valuable mineral deposits and not for other purposes. * * *

We note that the East Bay Regional Park District has applied for the land under the Recreation and Public Purposes Act, 43 U.S.C. §§ 869 *et seq.* (1970), and that Contra Costa County, within which the land is situated, supports this action. We believe they have the requisite interest to participate in further proceedings, and they will be recognized as parties in the hearing below. The other amici curiae have only a general concern for the environment of the area and the application of the mining law. Accordingly, they will not be granted status in the hearing as parties but may remain as amici for the limited purpose of filing briefs to the Judge or this Board.

Contestant requests that the Board reverse its decision of September 3, 1971. In support of its request contestant asserts that the decision of the Board is unclear as to exactly what standard was applied in connection with the marketability test. The test to be applied

(ON RECONSIDERATION)

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in determining whether the locator of a mining claim has demonstrated a discovery of a valuable mineral deposit is set forth by the Department in *Castle v. Womble*, 19 L.D. 455, 457 (1894):

[W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met.

This test has met the approval of the Supreme Court on several occasions. *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334 (1963); *Cameron v. United States*, 252 U.S. 450 (1920); *Chrisman v. Miller*, 197 U.S. 313, 322 (1905). In *United States v. Coleman*, 390 U.S. 599 (1968), the Supreme Court again approved the prudent man test and specifically recognized the marketability test as a logical complement to and refinement of the prudent man rule. In *Coleman*, the court stated:

* * * Minerals which no prudent man will extract because there is no demand for them at a price higher than the cost of extraction and transportation are hardly economically valuable. Thus, profitability is an important consideration in applying the prudent-man test, and the marketability test which the Secretary has used here merely recognizes this fact. 390 U.S. at 602, 603.

In our view, this Board applied the proper legal standard in our original decision. While we recognize that a mining claimant's bur-

den of proof may be more difficult to meet in a situation where, as here, developmental work on a claim has not reached the stage of full-scale mining operations, the standard to be applied is the same regardless of the extent to which a locator has developed his claim. Obviously, contestee's burden of proof is much more difficult to meet where development of his claim has not reached the point of actual sales and significant profits. See, e.g., *United States v. Pierce*, 75 L.D. 255 (1968); *United States v. New Jersey Zinc Company*, 74 L.D. 191 (1967); cf. *United States v. Anderson*, 74 L.D. 292 (1967). However, the mining laws do not require a mining claimant to demonstrate a paying mine as an accomplished fact. See *United States v. McKenzie*, 4 IBLA 97, 100 (1971).

Contestant next argues that the evidence adduced at the original hearing does not support a finding of discovery on each claim. Upon re-examination of the record, we conclude that the evidence is insufficient to make a final determination as to the validity of the claims. Therefore, all parties are afforded a further opportunity to produce evidence on those issues which were insufficiently covered at the first hearing.

Upon rehearing, in order to establish a discovery on each claim in issue, evidence should be further developed on the following points:

1. Significant variations in value occurred between the samples taken

by contestant and contestee. Therefore, further sampling is necessary to demonstrate clearly the quality and quantity of silica sand on each claim. In the analysis of the samples care should be taken to avoid combining samples from different claims. As this Board stated in *United States v. Bunkowski*, 5 IBLA 102, 79 I.D. 43, 51-52 (1972) :

[T]here must be a discovery on each claim. The appellants must show *as to each claim* that they have found a mineral deposit which satisfies the prudent man rule as complemented by the marketability test. (*Italics in original*)

In order to avoid further problems in connection with sampling, we recommend that joint sampling be conducted on each claim.

2. The quantity of sand on the claims should be considered in connection with the existing and foreseeable market; *i.e.*, evidence should be presented on the presence of sufficient reserves within the limits of each claim. The record contains no such evidence. Should the validity of one or more of the claims be established, the issue of possible excess reserves must be considered. See *United States v. Anderson*, *supra*.

3. Different grades of silica sand produce different types of glass. Thus, the critical issue in establishing marketability is the nature and extent of the market for each grade of glass sand and the approximate amount of each grade on each claim.

4. The milling and flotation process described by contestee in the original hearing needs further clarification in order to determine

whether the costs of beneficiation permit the silica sand to be marketed at a profit. In developing this evidence, to the extent it is reasonably possible, similar costs of other producers should also be presented.

Contestant contended, and the Judge so held, that absent an actual pilot testing of the proposed process, it cannot be determined whether the process can be worked at a profit. We reject such a position. Certainly, the existence of a successful pilot plant would greatly increase contestee's ability to demonstrate the costs of producing its silica sand and the feasibility of its process. When the contestee's case rests on a proposed flotation process which has yet to be tested, expert corroborative evidence would be helpful and might be essential in determining the potentiality of success. The Government, of course, may rebut such evidence.

5. Evidence relating to the costs of transportation should be further developed on rehearing. The subject claims are closer to the existing markets than the deposits of present suppliers. It does not necessarily follow, however, that contestee's costs of transportation will be lower. While distance is an important factor in determining transportation costs, it is not necessarily the only factor. Transportation costs may vary depending upon whether sand is shipped by road, rail, or water. Costs may also vary depending upon the difficulty presented by the geographic conditions of the route, as well as other factors.

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Contestee argues that silica sand is shipped "f.o.b. plant at \$4.25 per ton" and that transportation costs under these terms are incurred by the glass producers rather than the sand suppliers. We recognize that where a glass producer quotes a price for sand and incurs the transportation costs, the producer, in all likelihood, reflects this cost in the price per ton he is willing to pay a particular supplier for silica sand. However, we cannot determine from the present record whether glass producers would quote the same terms to contestee as they apparently have quoted to existing sand suppliers.

It may be that, because of geographic conditions or the mode of transportation, glass producers will offer better terms to contestee than they apparently have made to existing suppliers. On the other hand, because of geographic conditions or the mode of transportation, glass producers may not want to incur the expense of transportation, and therefore may offer contestee a price for its sand which does not reflect transportation as a cost. In the latter instance contestee would have to produce evidence to establish its cost of transporting sand from its claims to the glass producers. Whatever the situation might be, evidence should be developed on transportation costs so that an informed determination can be made with regard to this issue in applying the marketability test.

6. Since water is relatively scarce in the area of the claims, its availability, the contestee's right to use it and the cost related to such use are all items which must be considered on remand.

7. As discussed above, evidence, if any, as to additional costs necessary to meet pollution control standards, under such applicable federal, state, and local laws as may apply, is relevant to determine whether production may be reasonably foreseen as returning a profit to contestees.

8. In applying the legal standards to the facts of the case, all factors must be considered as of the time of the hearing and as of the time the land in issue was officially classified for disposition under the Recreation and Public Purposes Act, 43 U.S.C. §§ 869 *et seq.* (1970).

9. In addition to determining whether a discovery has been made and still exists on each of the claims, the date on which each discovery was made must be considered. The date is important for two reasons.

First, the claims were located by Steve Kosanke and others in 1963 and 1964 as association placer claims of 40 acres each. Three of the claims remaining at issue, Earache No. III, Earache No. V and Pete, still contain 40 acres. Although the exact date of transfer does not appear in the record, Kosanke's patent application, filed July 30, 1964, states that the claim had been conveyed to Kosanke Sand and Gravel Company. Unless a discovery is made

prior to the transfer of an association placer claim to a single claimant, the transferee is only entitled to perfect each claim as to 20 acres. *United States v. Harenberg*, 9 IBLA 77, 86 (1973); *United States v. Lease*, 6 IBLA 11, 27; 78 I.D. 379, 386, n.5 (1972). Therefore, unless there was a discovery on each of these three claims prior to the date of the transfer to contestee, each claim can be valid for 20 acres at most.

The date of discovery is also crucial for another reason. On September 30, 1970, the California State Director, BLM, classified the lands covered by these mining claims for lease or sale for recreational use under the Recreation and Public Purposes Act, 43 U.S.C. §§ 869 *et seq.* (1970). The classification withdrew the land it covered from disposition under the public land laws, including the mining laws, but did not adversely affect valid existing rights. *Buch v. Morton*, 449 F.2d 600 (9th Cir. 1971). Therefore, all the requirements essential to a valid mining location must have been completed by that date at the latest.

The classification was made pursuant to an application filed on October 24, 1964, by the East Bay Regional Park District. East Bay Regional Park contends that equity and the doctrine of *de facto* withdrawal require a relation back of the classification decision to the date of its application. While the Department has held that in some circumstances the classification or other disposition of public land re-

lates back to the date of filing of the application leading to such action, *Frank Melluzzo*, 72 I.D. 21 (1965); *Harry E. Nichols*, 68 I.D. 39 (1960), it has not ruled upon whether an application under the Recreation and Public Purposes Act falls within this principle. See *R. C. Buch*, 75 I.D. 140, 144 (1968), *aff'd*, *Buch v. Morton*, *supra*.¹⁶ Since the issue may not arise in this case, depending on resolution of other factual questions, we do not decide it now. However, to resolve all possibly pertinent matters, we request the Judge to consider in his findings whether a discovery existed as of October 24, 1964.

At the hearing, the parties may develop such other evidence as is pertinent.

This case has engendered considerable public and legislative comment within the San Francisco and Sacramento areas. Nevertheless, we are confident that each Administrative Law Judge situated in Sacramento would conduct the hearing with judicial detachment and fairness. We are concerned, however, not only with the substance of justice, but also with its appearance. Consequently, to remove any basis for doubt as to the impartiality of further proceedings, we direct that a Judge be assigned from the Salt Lake City Office, Hearings Division, Office of Hearings and Appeals, to hear this case.

¹⁶ For a discussion of the resolution of a conflict between an oil and gas lessee and a mineral locator, see *Union Oil Company of California*, 65 I.D. 245 (1958), *aff'd*, *Union Oil Company of California v. Udall*, 289 F.2d 790 (D.C. 1961).

(ON RECONSIDERATION)

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Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of this Board dated September 3, 1971, is set aside and the case is remanded for further hearing and decision.

NEWTON FRISHBERG, *Chairman*.

WE CONCUR:

JAMES M. DAY, *Director*,
Ex Officio Member.

FREDERICK FISHMAN, *Member*.

DOUGLAS E. HENRIQUES, *Member*.

MR. STUEBING CONCURRING
IN PART, DISSENTING IN
PART.

I am in full agreement with those portions of the majority opinion which hold (1) that the accomplishment of an environmental analysis and statement as contemplated by section 102(C) of the National Environmental Policy Act of 1969 is not a prerequisite to the issuance of a patent to a valid mining claim located in compliance with the Act of May 10, 1872, *as amended*, and (2) that the law does not provide that claims so located may be found to be invalid by weighing the prospective value of their anticipated mineral yield against the present or prospective value of the land for other purposes.

However, I do not agree with the majority that the state of the record

is so deficient that it will not support the conclusion reached in the decision of September 3, 1971 (3 IBLA 189). Accordingly, I adhere to that decision.

EDWARD W. STUEBING, *Member*.

I CONCUR:

ANNE POINDEXTER LEWIS, *Member*.

MRS. THOMPSON CONCURRING
IN PART, DISSENTING
IN PART

I agree that this case must be remanded for a further hearing to resolve adequately the question of the validity of the claim and entitlement to patent.

I disagree with Mr. Frishberg's opinion with regard to the question relating to a comparison of mineral and other land values. I believe his opinion sweeps unnecessarily and too broadly in ruling on the materiality of comparative values. He recognizes that evidence of nonmineral values may be admitted for the purpose of evaluating the claimant's good faith and in assessing the weight and credibility of his testimony. With this I agree. However, I disagree with the attempt to resolve the broader question as to the application of the comparative value test on the validity of mining claims in other respects. There are conflicting precedents and viewpoints in applying such a balancing test. A ruling of such importance is best made after all of the facts are

known. It may be that this case will be resolved on further hearing without the necessity of deciding this question. Therefore, a ruling now is premature. Evidence on comparative values may be admitted, in any event, although cast in a different complexion.

Accordingly, I would defer a final ruling on the scope of the applicability of comparative values in evaluating the validity of a mining claim, and the mineral character of the land embraced thereby, until resolution of the question is required after the complete factual record has been made. This obviates any reason for discussing the principles involved and my viewpoints on this question at this time.

JOAN B. THOMPSON, *Member*.

WE CONCUR:

MARTIN RITVO, *Member*.

JOSEPH W. GOSS, *Member*.

UNIFORM RELOCATION ASSISTANCE APPEAL OF MALDRUS AND GERALDINE EASLEY

1 OHA 18

Decided August 3, 1973

Appeal from a determination dated October 10, 1972, by the Regional Director of the Southwest Region of the Bureau of Reclamation, concurred in by the Commissioner of the Bureau of Reclamation, disallowing, in part, a claim for relocation assistance benefits in connection with the acquisition by the United States of Tract No.

1-35-417, Mountain Park Project, Oklahoma.

Affirmed.

Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970: Uniform Relocation Assistance: Moving and Related Expenses: Payment for Moving Expenses: Generally

A claimed loss in appraised value of a dwelling property which serves as the headquarters for a farm operation, and the expense incurred in obtaining the appraisal, being unrelated to the transaction in which the United States acquired one of two disconnected tracts comprising the farm operation, one of which was situated approximately .8 miles north of the dwelling site property and the other approximately 5¼ miles southwest of it, are properly disallowed as not compensable.

Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970: Uniform Relocation Assistance: Moving and Related Expenses: Payments in Lieu of Moving and Related Expenses: Fixed Payment: Partial Taking of Farm Operation

A claim for a fixed payment in lieu of actual moving and related expenses is properly disallowed in the case of a partial acquisition of a farm operation where the farm met the definition of a farm operation prior to the acquisition and the property remaining after the acquisition also meets that definition.

APPEARANCES: Maldrus and Geraldine Easley, pro se; Alvertus V. Rasco, Jr., Esq., Office of the Field Solicitor, U.S. Department of the Interior, Amarillo, Texas, for the Bureau of Reclamation.

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*OPINION BY MS. PATTON
OFFICE OF HEARING AND
APPEALS*

Maldrus and Geraldine Easley have appealed from a determination dated October 10, 1972, by the Regional Director, Southwest Region of the Bureau of Reclamation, concurred in on November 14, 1972, by the Commissioner of the Bureau of Reclamation, disallowing, in part, their claim, as displaced persons, for relocation assistance benefits under section 202 of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 84 Stat. 1895, 42 U.S.C. § 4622 (1970), in connection with the acquisition by the United States on January 5, 1972, of an 80-acre portion of their farm operation, namely, the N $\frac{1}{2}$ NE $\frac{1}{4}$ sec. 35, T. 4 N., R. 17 W., I.M., Kiowa County, Oklahoma, as Tract 1-35-417 of the Mountain Park Project. Disallowed were the following items:

(1) Reimbursement of \$50, claimed under subsection 202(a)(1) of the Act as moving expenses, and representing the cost of an appraisal procured by the Easleys in January 1972, on their dwelling property in Snyder, Oklahoma, the headquarters for their farm operation.

(2) Reimbursement of \$3,000, claimed under subsection 202(a)(2) of the Act as loss of tangible personal property as a result of discontinuing a portion of the farm operation. This item refers to a loss in appraised value of the Easley

dwelling property in Snyder and represents the difference between a \$16,500 appraised valuation of that property in 1963, when it was purchased by the Easleys, and a \$13,500 valuation of the same property in 1972, when the United States acquired the 80-acre portion of land in the farm operation.

(3) Payment of the sum of \$2,500, claimed under subsection 202(c) of the Act, as a fixed payment in lieu of items (1) and (2) above and in lieu also of a payment allowed by the Bureau under subsection 202(a)(3) of the Act for expenses of \$390.33 incurred by the Easleys in searching for a replacement farm operation.

The Bureau found that the acquisition of the 80-acre ownership of the Easleys in Kiowa County, situated approximately 8 miles north of the town of Snyder, did not necessitate a move from the Easley dwelling site in Snyder and that it did not render the remaining 160 acres in the farm operation, namely, E $\frac{1}{2}$ NW $\frac{1}{4}$, W $\frac{1}{2}$ NE $\frac{1}{4}$ sec. 29, T. 2 N., R. 17 W., situated in Tillman County, approximately 5 $\frac{3}{4}$ miles southwest of Snyder, an uneconomic unit. Thus it held that items (1) and (2) above did not qualify for payment because they were unrelated to the transaction in which the United States acquired the 80-acre tract, and, further, that the Easleys were not eligible for the payment sought in item (3) because there was a partial taking only of the farm

operation and an economic farm unit remained.

A hearing on the appeal was held on April 12, 1973, at Altus, Oklahoma, before Administrative Law Judge John F. Curran.

The record discloses that prior to the acquisition of the 80 acres by the Government, 202.5 acres of the 240-acre farm operation were used for agricultural purposes, 76 acres of the 80-acre tract, or approximately 37 percent of the total tillable acreage, being so used. Cotton, wheat and other grains were the usual agricultural products of the farming operation. In addition, the operation supported the raising of an average of 50 cattle. The cattle were grazed on each of the tracts. Farm machinery and other equipment used in the operation were maintained at the Easley dwelling site property in Snyder and moved to the components of the farming operation as required, on the average a dozen times a year. There was no house, barn or other such improvement on the 80-acre tract; there was constructed on the tract, however, a cattle corral and a dirt watering tank. In transactions with the Agricultural Stabilization and Conservation Service of the U.S. Department of Agriculture, the 240 acres were shown on work sheets and payments as one farm in Tillman County, wherein the major portion of the land in the farming operation was situated. Copies of Federal income tax returns of the Easleys for the years 1970-1971, submitted by them for the record,

show that the 80-acre tract was operated at a net loss for both years.

With respect to moving and related expenses, subsection 202(a)(1) of the Act provides, pertinently, for reimbursement to a displaced person for "actual reasonable expenses in *moving* himself, his family, business, farm operation, or other personal property," and subsection 202(a)(2) provides that such person may be reimbursed for "actual direct losses of tangible personal property *as a result of moving or discontinuing* a business or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property." (Italics supplied.) In lieu of such payments and of "actual reasonable expenses in searching for a replacement business or farm," authorized by subsection 202(a)(3), the Act provides in subsection 202(c) for "a fixed payment in an amount equal to the average annual net earnings¹ of the business or farm operation, except that such payment shall be not less than \$2,500 nor more than \$10,000."

It is clear that the appellants' claims (1) and (2) do not fall

¹ "Average annual net earnings" as used in subsection 202(c) of the Act means one-half of any net earnings of the farm operation, before Federal, State, and local income taxes, during the two taxable years immediately preceding the taxable year in which such farm operation moves from the real property acquired, or during such other period as the displacing agency determines to be more equitable for establishing such earnings, and includes any compensation paid by the farm operation to the owner, his spouse, or his dependents during such period.

MALDRUS AND GERALDINE EASLEY

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within the category of items for which reimbursement is authorized under subsections 202(a)(1) and 202(a)(2) of the Act. The argument that there will now be less farm income from which to retire the indebtedness on the Easley residence in Snyder, Oklahoma, is unavailing. The Bureau properly held that these claims are unrelated to the acquisition of the 80-acre tract by the Government and are not compensable. Further, no other evidence has been presented to show any actual moving expenses incurred by the Easleys in connection with the acquisition of the 80-acre tract by the Government or any actual direct losses of tangible personal property as a result of moving or discontinuing their farm operation, which are allowable under the cited provisions of the Act. Indeed, the farm operation was not relocated or discontinued; it was merely diminished in size to the extent of one of the two disconnected tracts of which it had been comprised. The periodic movement of cattle and equipment from the acquired portion of the farm operation appears to have been accomplished in the regular course of operation of the two disconnected tracts as a single farm operation. It thus appears that no reimbursable expenses or losses of the nature contemplated by subsections 202(a)(1) and 202(a)(2) of the Act were incurred as a result of the acquisition of the 80-acre tract by the Government.

Concerning the claim for a fixed payment under subsection 202(c) of the Act in lieu of any authorized moving and related expenses under subsection 202(a), the Interim Regulations of the Department, issued April 16, 1971 (36 F.R. 7265-7273), which were in effect at the time of the submission of the appellants' claim, and which were promulgated in accordance with interim guidelines of the Office of Management and Budget, issued February 27, 1971, provided, in paragraph 9D, that where an entire farm operation is not acquired, the fixed payment shall be made only if the farm met the definition of a farm operation prior to the acquisition and the real property remaining after the acquisition is no longer an economic unit.² The Interim Regulations incorporated, within paragraph 3M, the definition of "farm operation" supplied in § 101(8) of the Act, namely, "any activity conducted solely or

² The same provision in the final regulations of the Department within 41 CFR Part 114-50 (38 F.R. 3965-3980, February 9, 1973, as amended in 38 F.R. 7116, March 16, 1973), is contained in § 114-50.702-1 which reads as follows: "Farms—Partial taking. Where a displaced person is displaced from only a part of his farm operation, the fixed payment provided in § 114-50.702 shall be made only if the displacing agency determines that the farm met the definition of a farm operation prior to the acquisition and that the property remaining after the acquisition does not."

The changed language in the final regulations affords a clarification of the applicable rule where there is a partial taking of a farm operation and follows substantially the language of the Office of Management and Budget guidelines for development of uniform regulations and procedures for implementing the Act, issued May 1, 1972, in Circular No. A-103.

primarily for the production of one or more agricultural products or commodities, including timber, for sale or home use, and customarily producing such products or commodities in sufficient quantity to be capable of contributing materially to the operator's support." (42 U.S.C. § 4601.)

Applying these criteria established by the law and the regulations to the facts of record in the instant case, it is evident that the Bureau correctly concluded that the Easleys are not eligible for a fixed payment in the sum of \$2,500 in lieu of the expenses which were allowed for searching for a replacement farm inasmuch as only a portion of the total farm operation was acquired and the real property remaining after the acquisition constitutes an economic farm unit. The two disconnected tracts were utilized as a single farm operation of 240 acres and the real property remaining after the acquisition by the Government of the 80-acre tract is shown by the record to be an economic unit for the principal portion of the farming operations concerned. It is comprised of 160 acres, of which 126.5 acres are tillable lands representing 63 percent of the agricultural acreage in the original farm operation. Such remaining real property clearly meets the definition of a farm operation contained in the Act.

In view of the foregoing, the determination of the Regional Director of the Southwest Region of the Bureau of Reclamation, con-

curring in by the Commissioner of the Bureau of Reclamation, which disallowed those items of the Easley claim which are the subject of this appeal, is affirmed.

This decision constitutes the final administrative determination of the Department in this matter. 41 CFR 114-50.1101-1.

FRANCES A. PATTON,
Special Assistant to the Director.

BREZINA CONSTRUCTION CO., INC.

IBCA-757-1-69

Decided August 10, 1973

Contract No. 14-20-A00-6746, Project No. 5-2(1), Little White River Road, Rosebud Reservation, Rosebud, South Dakota.

Bureau of Indian Affairs.

Determination of Compensation.

**Contracts: Disputes and Remedies:
Damages: Actual Damages**

Where the Government is obligated to compensate the contractor for restoration of damaged work under a contract for road construction and actual costs are in evidence, the contractor's entitlement to compensation is based on recorded actual costs.

**Contracts: Disputes and Remedies:
Burden of Proof—Contracts: Disputes
and Remedies: Substantial Evidence—
Contracts: Disputes and Remedies:
Damages: Measurement**

Expert testimony giving estimates of what would be the cost for a reasonable contractor to restore damage to a road project and to finish the roadway is not

August 10, 1973

accepted where the testimony is unclear and ambiguous respecting the applicable time period, whether all elements of costs and profit are included, and whether the task being estimated was comprehended by the expert.

Contracts: Construction and Operation: General Rules of Construction—Contracts: Disputes and Remedies: Damages Generally—Contracts: Disputes and Remedies: Equitable Adjustments

Where the Government is obligated to "compensate" the contractor for restoring damaged work under a contract provision entitled "Contractor's Responsibility for Work," the word "compensate" is considered to have a different and more limited meaning than the words "equitable adjustment" used in other provisions of the contract.

APPEARANCES: Isaac Groner, Herbert Adelman, Attorney at Law, Cole & Groner, Washington, D.C., for the appellant, Edward L. Meredith, Department Counsel, Billings, Montana, for the Government.

OPINION BY MR. LYNCH

*INTERIOR BOARD OF
CONTRACT APPEALS*

This case is before the Board on the sole issue of the amount of compensation due appellant for work required to restore rain damage to the Little White River Road project. In an earlier decision,¹ we found that rain damage to the par-

tially completed project occurring on June 11 and September 17, 1967, resulted from "extraordinary action of the elements." According to the contract provision entitled: Contractor's Responsibility for Work,² the Government had the obligation to compensate the contractor for the restoration of damaged work resulting from such cause.

² "Article 7.11—Contractor's Responsibility for Work.

"7.11 Contractor's Responsibility for Work. Until the final acceptance of the work by the Contracting Officer, as evidenced in writing, as provided in article 5.6, the contractor shall be responsible for the work as provided in Clause 12, General Provisions, Standard Form 23A, and shall take every precaution against injury or damage to any part thereof by the action of the elements, or from any other cause, whether arising from the execution or from the nonexecution of the work. The contractor, at his own expense, shall rebuild, repair, restore, and make good all damages to any portion of the work, except those damages due to unforeseeable causes beyond the control of and without the fault or negligence of the contractor, including, but not restricted to acts of God, or the public enemy, acts of the Government, in either its sovereign or contractual capacity, extraordinary action of the elements, unavoidable slides, and ordinary wear and tear on any section of the road opened to traffic by order of the contracting officer: Provided, that the contractor will immediately notify the contracting officer, in writing, of such damages. The contracting officer shall ascertain the facts and compensate the contractor for the restoration of the damaged work when in his judgment the findings of fact justify such payment, and his findings of fact thereon shall be final and conclusive on the parties thereto, subject only to appeal as provided in Clause 6, 'Disputes,' General Provisions, S.F. 23A.

"In case of suspension of work for any cause whatever, the contractor shall be responsible for all work in place, all materials delivered to the site, and shall properly store them, if necessary, and shall provide suitable drainage of the roadway and erect necessary temporary structures at his expense. He shall properly and continuously maintain all living material in newly established plantings, seedling, and soddings furnished under this con-

¹ IBCA-759-1-69, November 20, 1970; 70-2 BCA 8574. The decision also found the amount of entitlement using the jury verdict approach. On appeal to the United States Court of Claims (No. 487-71), proceedings were suspended upon joint motion of the parties by Order dated October 25, 1972 to permit a rehearing on the issue of quantum before the Board.

A rehearing limited to the issue of quantum was held March 7-8, 1973. At the hearing a stipulation dated March 7, 1973, was accepted in evidence. The stipulation included the parties' agreement that the Board should limit its consideration of the prior record to certain specified documents and additions to the record in the present proceedings.³ Accepting the restrictions agreed to by the parties, the Board has limited consideration of the

tract, and shall take adequate precautions to establish and protect against injury new tree growth and other important vegetative growth."

* Stipulation, par. 11:

"11. In determining the damages issue, the Board should not consider the previous record in this case, its previous decision, or any other materials not introduced during the present proceedings, other than (1) the Findings of Fact and Decision of the Contracting Officer dated December 20, 1968 and the documents therein contained, and (2) each of the documents listed below, admitted by stipulation in the prior proceeding and presently in the possession of this Board, which are identified below with the numbering and lettering system used in the previous proceeding, as well as the titles therein used:

- A. Specifications.
- B. Plans.
- C. Certified Payrolls, 1 through 63.
 1. June 24, 1966, Contract.
 2. July 29, 1966, Contractor's Plan of Construction and List of Equipment.
 3. August 1, 1966, Notice to Proceed and Acknowledgement of Receipt.
 4. August 20, 1966, Progress Estimates, 1 through 12.
 5. March 10, 1967, Revised Plan of Construction.
 6. August 10, 1967, Revised Plan of Construction.
 7. June 21, 1967, Contractor's letter advising of rain damage.
 8. July 10, 1967, Contracting Officer's letter acknowledging Contractor's letter of June 21, 1967.
 9. July 10, 1967, Contractor's letter pertaining to the rain damage.
 10. September 29, 1967, Contractor's letter pertaining to rain damage.
 11. September 29, 1967, Contractor's letter pertaining to rain damage.
 12. October 13, 1967, Contracting Officer's

record according to the terms of the stipulation.

Facts

Appellant was awarded a contract dated June 24, 1966, for grading and other work on 7.084 miles of the Little White River Road. The estimated contract consideration was \$243,123.76, based on various unit prices for estimated quantities. The contract required the grading, watering and compacting of the planned new road, which was to be paved subsequently by the Government. Performance commenced on or about August 1966, and was completed on or about January 23, 1968.

Appellant sought compensation in the amount of \$90,716.82 from the Contracting Officer for restoring damage caused by two severe rains occurring on June 11, 1967, and September 17, 1967.⁴ By his decision dated December 20, 1968, the Contracting Officer found appellant to be entitled to \$2,719.20 for restoring work damaged by the June rain, and denied any compensation in connection with the September rain. The appeal of that decision to the Board resulted in a finding, following a hearing, that both the June and September rains were extraor-

letter acknowledging Contractor's letter of September 29, 1967.

13. January 25, 1968, Contractor's letter submitting claim.

36. AGC Equipment Ownership Expense (6th ed.).

Previous documents and testimony may, however, be used for the purposes of impeachment, but if so used should only be considered by the Board for such limited purposes."

⁴ Findings of Fact and Decision by the Contracting Officer, dated December 20, 1968, p. 1.

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dinary actions of the elements entitling appellant to compensation in the amount of \$25,000.

As presented at the hearing of March 7-8, 1973, appellant claim was for a total amount of \$92,678 as compensation for the rain damage restoration work.⁵ In its brief, appellant claims a total of \$110,239 based upon computations using estimates provided by appellant's expert witness at the hearing.

Appellant's two witnesses at the hearing were Mr. Robert W. Brezina, president of the Brezina Construction Company for the past 27 years (Tr. 19), and Mr. Kenneth Harris, an experienced grading construction contractor who testified as an expert witness. In addition, two documents offered by appellant were added to the record made at the first hearing. The first is a book containing 29 photographs, and the second is an 11-page document setting forth appellant's claim for \$92,678.⁶

Mr. Brezina testified that he had personally visited the project site approximately 10 times and also had flown over the project at low altitudes to observe operations about 10 times (Tr. 20). Additionally, he kept informed about the project through telephonic and personal reports from the job superintendent and other employees, pay-

roll reports, and project estimates. He recalled that there were about 29 steep back slopes averaging about 40 feet in height on the seven miles of the project (Tr. 22).

Regarding the June 11, 1967 rain, Mr. Brezina characterized it as a 100-year rain, the volume of water falling in a given time period being an amount anticipated by the Weather Bureau only once every 100 years (Tr. 29, 67). He stated that prior to June 11, the work had progressed to the point that 5 to 5½ miles had been rough graded (Tr. 22-23); 2½ miles had been finished (Tr. 23); and, 3½ miles of back slopes had been completed (Tr. 71). He directed that pictures be taken of the damage to the road, and this was done within a couple of weeks (Tr. 24). He also visited the project site to assess personally the damage caused by the rain (Tr. 30). The rain had eroded the back slopes, washed out some grade, filled culverts, ruined cattle passes, etc. (Tr. 24). He testified that work could not be resumed immediately after the rain (Tr. 29), and this resulted in a 22½ hour shift delay (Tr. 48).

The September rain was characterized by Mr. Brezina as a 50-year rain, which was even more damaging, because more of the road had been opened up by that time (Tr. 29). He stated that by September 17, 1967, all the rough grading had been completed and 3½ miles of road finished (Tr. 29). Inasmuch as the finishing of the back slopes followed the rough grading, all or most of the back slopes were

⁵ Appellant's Exhibit No. 2-2 entitled: "Cost of rain restoration work derived from payroll records." All exhibits added to the record in the present proceedings have the prefix number "2" to differentiate such documents from earlier record documents.

⁶ Appellant's Exhibits Nos. 2-1 and 2-2, respectively.

done, according to Mr. Brezina (Tr. 30). Additionally, he estimated that restoration of the June rain damage had progressed $2\frac{1}{2}$ miles on the back slopes and $3\frac{1}{2}$ miles on the roadbed (Tr. 72). He described the damage done to various parts of the road and back slopes by both rains by reference to pictures taken shortly after each rain (Tr. 26-28, 30-35). He stated that machines repairing the eroded slopes were less efficient than when cutting of the uneroded slopes initially (Tr. 33). The machines could not go directly up the steep slopes, but had to follow a more distant and difficult route to "come up behind and on top and then work down." (Tr. 34.)

In testimony concerning the claim presented in Exhibit 2-2 and the extent of restoration required, Mr. Brezina stated that the finish and restoration work were segregated from normal contract work "by keeping track of the finish equipment and the extent to which it was used on the contract." (Tr. 36.) Different machines were used for the finish work and restoration than for other contract work (Tr. 37). Finishing is admittedly a part of the normal contract work. It is appellant's position that, although no segregation of costs exists for these machines whether engaged in finishing or restoration work; identification of restoration costs is possible by deducting the normal finishing cost per mile from the total cost for these machines during the restoration period.

Mr. Brezina testified that most of

the restoration work involved moving dirt from the bottom of the slopes to the top and then dragging filling and shaping of the contours (Tr. 232-233). He said that virtually all of the back slopes had to be redone including those shown in pictures 28 and 29 of Appellant's Exhibit 2-1 (Tr. 232), which slopes the agency road engineer Hauff claimed were not required to be redone (Tr. 146). In computing the amount of operating costs included in the claim, Mr. Brezina stated that the availability factor used included down time shown in the Government logs (Tr. 45). Regarding the computation of equipment ownership costs, a seven month working season was used because Mr. Brezina said that was the recognized working season in western South Dakota (Tr. 46). Percentages charged to the restoration period were derived from the Associated General Contractors' ownership expense manual. (AGC manual)⁷ (Tr. 47).

Mr. Harris, testifying as an expert for appellant, confirmed that he "always figured seven months" as the number of working months a year in South Dakota (Tr. 80). In addition, he testified regarding the cost of restoring the rain damage as follows:⁸

Q. On the basis of your experience in the business and your study and consideration of this project, and assuming

⁷ Appellant's Exhibit 36.

⁸ The estimate of the 31,159 cubic yards of dirt that had to be moved as a result of the rain damage was confirmed by Mr. Hauff, the agency road engineer (Tr. 204).

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that there were 31,159 cubic yards of rain damage, what would be the costs incurred by reasonable contractor?

A. Well, if I had to put it back up on the slopes, why—is that what you mean?

Q. Yes, to restore the back slopes to what they had been prior to the rain damage.

A. It would be very costly. I think two or two and a half dollars a yard.

Q. Would it be closer to two and a half or to two?

A. Well, if you had to pick it up from the bottom and put it up on the slope, why it would probably be closer to two and a half.

Q. Two and a half dollars per cubic yard?

A. Yes.

Q. This estimate would cover only the costs of restoring the slopes, is that correct? It would not include the cost of restoring the roadbed, am I correct?

A. Well, you asked—that is what I would want to put it back up on the slope from viewing those pictures.

Q. Would that restore the roadbed to the previous condition?

A. No, I don't think so.

Q. In other words, the cost that you have testified to, two to two and a half dollars a yard, is essentially the cost of moving dirt, is that correct?

A. Two and a half dollars a yard?

Q. A cubic yard, yes.

A. Yes.

Q. Would there be additional costs incurred by a reasonable contractor in restoring the roadbed?

A. I think so, yes.

Q. And what costs would be incurred by a reasonable contractor in that respect?

A. Well, if you just call it finishing, as I think you do now, that soil takes an awful lot of finishing.

Q. Let me, if I may interrupt you, let me direct your attention to Specification 102 of this contract, which reads as follows: I am quoting:

"Degree of finish for grading of slopes

shall be that ordinarily obtainable either from blade grader or scraper operations or hand-shovel operations, as the contractor may elect. The nicety of finish ordinarily associated with tinplate (sic) and string line or hand-raking methods will not be required except in the case of shoulders and gutters."

Now bearing that in mind, in addition to all of the other factors, what is your answer as to the costs that would be incurred by a reasonable contractor with respect to the roadbed?

A. Well, finishing like that, if somebody would ask me to finish it after, you know, it was just a matter of assuming that it was rough graded pretty close, why in that soil it is kind of hard to say, but probably between three or four thousand dollars a mile. (Tr. 77-79.)

After several questions directed to Mr. Harris relating to the reasonableness of details of the claim, the following question concluded his direct testimony:

Q. In computing a bid or reasonable cost, what is the appropriate percentage for overhead?

A. I don't really figure it that way. I generally look at a job and bid it. All of ours are bid by the grade, on the grading part of it. I guess I don't go into it quite that way. I don't think I can answer that. (Tr. 82.)

In response to a query by Government counsel as to the cost per yard to round off the tops of the slopes and pushing the earth over rather than to bring it up from the bottom, Mr. Harris estimated the cost to be 25 or 30 cents per cubic yard. (Tr. 85.) Questions asked of Mr. Harris respecting the comparative cost of filling the washout areas of slopes by using dirt from the top were responded to without specific estimates of the costs of this

alternative method of repairing the slopes (Tr. 90-94).

The Government presented testimony by Mr. Stephen L. Payne, an auditor with the Department of the Interior, respecting his review of the appellant's books.⁹ Mr. Payne stated that the costs claimed for restoration work could not be substantiated because there was no segregated account showing what was restoration work as distinguished from ordinarily required contract work (Tr. 98). However, his review did confirm that the total posted costs were \$289,576.88 (Tr. 102), of which \$62,902.17 were depreciation and interest costs (Tr. 104), \$11,151.06 were for a subcontract for cattle passes (Tr. 104), and \$20,131.70 were for the purchase of culvert pipe (Tr. 104-5). Additionally he found that actual overhead expenses were 6.5 percent rather than the 10 percent included in the claim.

Mr. William Hauff was the agency road engineer with responsibility for supervising the work on this contract. He was out on the road one or two times a week (Tr. 130). He provided the following information, which was not controverted except where indicated. The contractor did not always have grade checkers on the job to guide the equipment operators, with the result that some of the slopes were cut too steep. (Tr. 132.) He compared this practice with his observations of Mr. Harris cutting slopes on another

portion of the same road and observed grade checkers guiding the operators so that the slope was cut according to plans as they worked from top to bottom (Tr. 135-6). Such undercutting of slopes was said in one instance to have resulted in a flat-bottomed ditch 20-25 feet wide instead of the required V shape (Tr. 137).¹⁰ He stated that the undercutting could not have been done by rain (138).

Mr. Hauff said that the rough grading of the roadway was similarly done, with the result that the road would vary from 1 foot to 1½ foot too high or too low as compared with the more common practice of rough grading to within two to three tenths of a foot as indicated by the bluetop stakes (Tr. 163-6). The result of this departure from normal grading practice was that the finishing equipment was required to do work normally done by the heavier rough grading equipment and thereby increased finishing costs an estimated 1½ times normal cost (Tr. 182-4). Additionally, the finishing crew built some of the approaches and removed excess dirt which was normally done by the rough-grading equipment (Tr. 183-4).

Mr. Hauff thought that the pictures in Appellant's Exhibit 2-1 were taken in the worst areas and were not typical of the erosion damage on the entire project (Tr. 143-44).

The Government's final witness was Mr. De Wayne Storley, the cur-

⁹ Government Exhibit 2A, Audit of Contractor's Claim, dated January 1973.

¹⁰ Government Exhibit 2F.

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rent area road engineer. Mr. Storley was not involved in the road project appellant was required to accomplish. His testimony as an expert witness was accepted over the objection of appellant's counsel. He testified that his analysis of the blue top notes made by the survey crews on the job confirmed that there was overbuilding and unexcavated fill on the job (Tr. 212-14). He examined appellant's claim and concluded that major overhaul costs were included both in operating costs and ownership costs (Tr. 217). Mr. Storley made an analysis of appellant's claim which included a conclusion that equipment ownership costs on restoration and finishing work should be the same as for the other contract work (Tr. 222).¹¹ His analysis reduces the claimed \$48,646 for ownership costs to \$13,087.14 and the total claim to \$16,314.08.

Appellant's position is that the best and controlling evidence of costs is the objective testimony of his expert. Therefore, the claim was re-computed after the hearing to conform to that testimony, as follows:

31,159 cubic yards of dirt moved	
at 2.25 yd.-----	70, 108
6 miles of re-finishing required	
at \$3,500 per mile-----	21, 000
Overhead at 10%-----	9, 110
Profit at 10%-----	10, 021
Total -----	110, 239

¹¹ Government Exhibit 21. Mr. Storley's computation of ownership costs is based on the acquisition cost reported by the auditor, depreciated over five years using a ten-month working season and applying other cost factors taken from a Caterpillar handbook.

The claim was presented at the hearing as follows:

Labor Costs (see Part II hereof, "Labor Costs")-----	\$23, 360
Equipment Operating Costs (see Part III hereof, "Equipment Operating Costs")-----	19, 391
Equipment Ownership Costs (See Part IV hereof, "Equipment Ownership Costs")-----	48, 646
Shift Delay Expense-----	2, 693
Subtotal -----	94, 090
Deduct Normal Finishing Costs of \$3,500 per mile (5 miles*)-----	17, 500
	76, 590
Overhead (10%)-----	7, 659
	84, 249
Profit (10%)-----	8, 429
AMOUNT CLAIMED-----	\$92, 678

*As of June 11, two miles of finishing had been completed. The remaining five miles of finishing was completed with the labor and equipment included in this claim and the cost of such finishing is, hence, deducted from the Contractor's claim. No other work required to be done under the Contract is so included.

The testimony of Mr. Brezina concerning the actual costs are treated by appellant as corroborative of the reasonableness of the costs derived from the expert's estimates.¹²

The Government position is that appellant's claim is inflated by the alleged duplication of equipment overhaul costs in both operating and ownership cost items, the amount of ownership costs claimed, the claim for profit where the contract says the contractor shall be reimbursed and in the use of normal finishing costs per mile when the

¹² Appellant's main brief, pp. 16-18.

finishing crews did rough grading as well.

Decision

Appellant's post-hearing position places great reliance on two estimates by his expert witness, *i.e.*, that two to two and one half dollars a yard would be the cost to a reasonable contractor for restoring the slopes and that three to four thousand dollars a mile would be the cost for the reasonable contractor to finish the roadway. Even were the Board to agree with the conclusiveness of expert testimony, which it does not;¹³ there is less reason to accept it in this instance. In order to be accorded significant evidentiary value, an expert's testimony must be clear and unambiguous. The estimates of cost given by Mr. Harris in 1973 related to work done in 1967. He was not asked what the costs would have been in 1967, and his responses did not relate his estimate to the time period in which the work was done. His entire testimony contains no reference to the time period when the restoration work was accomplished (Tr. 74-95). Costs do not remain constant from year to year. It is left for the Board to conjecture as to whether Mr. Harris was referring to costs in 1967 or whether he was giving current cost estimates.

A second problem with Mr. Harris' estimates is that he may have been giving price estimates rather than cost estimates as re-

quested. This is indicated in the following exchange: (Tr. 78).

Q. This estimate would cover only the costs of restoring the slopes, is that correct? It would not include the cost of restoring the roadbed, am I correct?

A. Well, you asked—that is what I would want to put it back up on the slope from viewing those pictures. (Italics added.)

Another indication that questions relating to cost were answered by Mr. Harris with price estimates occurred when asked the appropriate percentage for overhead: (Tr. 82).

A. I don't really figure it that way. I generally look at a job and bid it. All of ours are bid by the grade, on the grading part of it. I guess I don't go into it quite that way. I don't think I can answer that.

Unable to provide information regarding the normal separate elements of cost making up his estimate, and absent any explanation for his inability to answer, one inference that might be drawn is that all elements of cost and profit were included in his earlier estimates.

Another aspect of Mr. Harris' testimony was his failure to respond directly with "cost estimates" when asked to give comparable estimates for repairing the slopes without bringing up the dirt from the bottom. In giving his initial estimate of 2 to 2½ dollars a yard, he volunteered the qualification, "if I had to put it back up on the slopes," before giving his estimate. Despite the greater specificity in repeated questions asking for the comparable cost for using available dirt on top for filling the washouts, Mr. Harris did not respond with an estimate of cost

¹³ *Steenberg Construction Company, IBCA-520-10-65, 791.D.158 (1972), 72-1 BCA par. 9459, at p. 44,044.*

(Tr. 90-94). Instead, he required more information about his responsibility for handling the dirt after he pushed it over the top (Tr. 90-91).¹⁴ The inability to give the requested estimate when taking dirt from the top raises doubts as to whether Mr. Harris had full comprehension of the task he "costed"

¹⁴ An illustrative exchange occurs at Tr. 90-91:

"Q. Mr. Harris, could you give an estimate of what you would charge to scrape the dirt off of the top of the hill and fill those same slopes that you testified to on direct examination, do the same job, pushing the dirt off of the top of the hill over the edge as a completed job as compared to trying to push it up from the bottom—in other words, the cost per cubic yard if it was done that way, as opposed to taking the dirt from the bottom and pushing it up over the slope?

"A. You want me to give an estimate what I would do that for?

"Q. Yes, an estimate as to what it would cost to scrape the top of the slope over to fill the washes and then, I suppose, you might have a little clearing at the bottom, the cost per yard as compared to the two and a half dollars the other way.

"A. I don't know without knowing how much responsibility there is with it. If you just push it over, if you have to get on the slope all of the way down, that is pretty near impossible with a dozer.

"Q. Mr. Harris, speaking about your previous direct testimony where you said you would charge \$2 ½ a yard to take material at the bottom of the slope and place it back on top, what would you actually do for that 2½?

"A. Well, fill those washouts. I assume that is what they wanted done.

"Q. In what way? I mean would you take the machinery up on the slope to fill the washouts or not?

"A. Well, you would probably have to take it up to the top and push it over, but then to get the ruts filled some way, if your crawler tractor can't crawl up, it would have to be brought over.

"Even if you just doze it over the top, you still would have to get those.

"When I said \$2 ½ a yard, I meant to pick up the dirt and fill the washouts. It wouldn't make any difference whether you pushed it over the top or how you did it. If you couldn't crawl up the slope, then you would have to push it over the top and push it down."

or "priced" taking the dirt from the bottom.

The uncertainty as to the time period associated with the estimates given by Mr. Harris, the open question as to whether his estimates were "costs" or "prices," and the doubts his own testimony casts on his comprehension of the task being estimated lead to our conclusion that little, if any, probative value can be found in the expert testimony on which appellant relies.

Apart from the claim \$110,239 based on the expert testimony, there remains the claim of \$92,678 to be considered. The latter amount is based on the contractor's books and records and on equipment supplier and AGC data.

Appellant claims labor costs of \$23,360, which is the amount verified by the Government audit as the amount charged to finishing and restoration work.

Appellant claims \$19,391 for equipment operating costs as opposed to the Government allowance of \$17,323.84 for this item. Both parties use the same operating cost per hour, but differ on the total hours worked by each piece of equipment. The number of hours used by appellant is an estimate of the time the equipment was actually in use which was expressed as a percentage "availability factor" in the claim.¹⁵ The number of operating hours used in the Government's computation was developed from Mr. Hauff's examination of daily

¹⁵ Appellant Exhibit 2-2, p. 4.

inspection reports.¹⁶ Each variance from the claimed hours of operating time was noted as to the difference in hours, date and reason therefor.¹⁷

The specific hours of equipment operation obtainable from the contract records is preferred over estimates. There is no reason to use estimates when unchallenged project records provide the precise data.

Appellant claims \$48,646 for equipment ownership costs which is derived from AGC data using a 7-month working season. The Government computes ownership costs to be \$13,087.14 based on acquisition costs reported in the Government audit, depreciated over five years, using a ten-month working season, and insurance, taxes and interest factors from a Caterpillar performance handbook. The Government contends that appellant actually did work ten months a year on the contract.

According to the Government auditor, the contractor's books show a total of \$62,902.17 (Tr. 104), for depreciation and interest within the total project costs, including restoration, of \$289,576.88. After deducting the aforementioned subcontracting and material costs which do not relate to equipment ownership, the balance of project costs are \$258,294. Total depreciation and interest charged to the project amounts to 24.35 percent of this balance.

Claimed ownership costs of \$48,646 is 52.48 percent of the total claim. In a recent decision, this Board stated:

When a contractor takes the position that its books and records are completely adequate for all purposes but equipment expenses and resort to AGC and AED rates may lead to overevaluation of the equipment, elementary fairness requires careful scrutiny of the figures in question.¹⁸

Appellant urges that equipment depreciation charges carried on the books are based on income tax principles and involves different accounting practices than involved in presenting a claim under a Government contract.¹⁹ No explanation of the differences is offered which would account for ownership costs to be recoverable at more than double the percentage on a claim than on the ordinary contract work.

Appellant cites *L. L. Hall Construction Company v. United States*, 177 Ct. Cl. 870 (1966), as authority for requiring the use of the AGC manual to determine equipment ownership costs. In *Hall Construction*, the court made clear that actual cost of equipment ownership is to be used if available rather than resorting to such secondary evidence as the AGC manual.²⁰ Here, actual costs are in evidence. Absent convincing reasons for such costs to

¹⁶ *Supra*, note 13, p. 44,042.

¹⁷ Appellant's reply brief, p. 13.

²⁰ The court stated at 885: "Is not the best evidence the actual costs? After all, these rate manuals are only guides and estimates based on national averages and subject to many adjustments. Where they are in evidence, and actual cost are not, they are only a tool with which to hammer out a reasonable 'jury verdict.'" (Italics added.)

¹⁸ Mr. Hauff testified that he compared the time claimed for each machine and examined the daily inspection reports for each day involved to determine whether the machine was working, broken down, idle, or off the job (Tr. 189).

¹⁷ Government Exhibit 2-H.

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be inappropriate for determining the true cost to appellant, we find that ownership costs are recoverable on the claim on an actual cost basis, *i.e.*, at the rate charged against total project costs in the contractor's records.²¹

Appellant claims \$2,693 for shift delay expense attributable to the inability to operate certain machines for 22½ hours after the June rain. The Contracting Officer denied this portion of the claim on the basis that it was a claim for delay, not restoration.²² Additionally, the Government denies there was any shift delay because the inspector's daily reports show some of the equipment working the day after the June 11 rain. There is no pay for delay provision in the contract and no element of Government fault is involved in causing the damage.

Article 7.11 states that "The contracting officer shall * * * compensate the contractor for the restoration of the damaged work * * *." This language is contained within an exception to a contract requirement making the contractor responsible to restore damaged work at his expense. The more customary and oft tested phrase: "equitable adjustment of the contract price" is not used. The choice of the word "compensate" in the contract provision relied on by appellant is deemed to

be for the purpose of imparting a different meaning than "equitable adjustment" as used in the usual Changes Clause. Webster's Seventh New Collegiate Dictionary (1970 edition) contains the following:

COMPENSATE implies making up a lack or making amends for loss or injury.

The "loss or injury" here for which the Government agrees to "compensate" appellant is the expense required to restore work damaged from certain causes. Neither idle equipment nor profit are expenses incurred in restoration work. The idle equipment may represent a loss of the use of it gainfully for a time, but a lost opportunity to make money is not an incurred expense or loss. No more is the loss of profit an incurred expense. Giving effect to the ordinary meaning of the word "compensate," the Government agreed to pay appellant restoration expenses when caused by certain events beyond appellant's control. "Making amends for loss or injury" does not extend to reward beyond the specific loss or injury involved with profit or with lost revenues due to idled equipment. We find that neither the shift delay expense nor the profit claimed by appellant is recoverable under the contract.

Appellant claims entitlement to overhead expense at 10 percent of his restoration costs. The Government contends that the rate should be 5.4 percent. The audit report indicates the actual overhead rate to be 6.5 percent. This rate is reduced to 5.4 percent if all the disallow-

²¹ It is not necessary to consider appellant's argument that its recorded costs must be presumed to be reasonable. This opinion accepts recorded costs. However, the AGC derived ownership costs are not recorded costs.

²² *Supra*, for 4 — p. 70.

ances listed by the auditor were taken. The items disallowed are advertising and promotion, donations, dues and subscriptions, interest and officer's life insurance. The report disallows all these items on the ground that they are not allowable under FPR 1-15.205. Apart from this conclusion, no information is given as to the amounts or reason for the disallowances.

Reference to the cited section of FPR shows that these selected costs are not all unallowable, but some may be allowed under the provisions of that section. For example, FPR 1-15-205-43 clearly provides that certain memberships and subscription costs are allowable. No review of the auditor's conclusion is possible without information regarding the specific amounts involved and the reason for not allowing the cost. The variance between the actual overhead rate of 6.5 percent and 5.4 percent is negligible and we choose to accept the actual rate before disallowances.²³

There remains the question of the proper amount of finishing costs per mile to be deducted from the commingled account of finishing and restoration costs in order to determine restoration costs. Appellant contends that \$3,500 per mile for normal finishing costs was stipu-

lated between the parties during the earlier proceeding.²⁴ The reference to the transcript of the first hearing is made by appellant to impeach the Government's present position that \$5,500 per mile of finishing costs should be deducted from the commingled account. Also relied on for impeachment purposes is the fact that Mr. Hauff had used the \$3,500 figure in the preparation of an exhibit in the earlier proceedings.²⁵

The Government's position in the present proceedings is that appellant's use of finishing equipment to do more than normal finishing work resulted in abnormal finishing costs. Mr. Hauff testified that finishing by the work procedures used by appellant would cost 1½ times normal finishing costs (Tr. 182). His testimony regarding the unusual amount of work left for finishing crews to do was not controverted by appellant. Appellant argues that it relies on objective expert testimony rather than existing records of actual costs and that contractor efficiency or lack thereof is "wholly and entirely irrelevant to the objective approach."²⁶

The Government does not abandon or contradict its earlier stipulation of the cost of normal finish-

²⁴ Transcript of hearing commencing June 19, 1969, pp. 273-275.

²⁵ Exhibit 31 entitled "Study of Rain Damage." "The contractor has computed normal finishing costs at a conservative \$3,500 per mile in his claim and we have used \$3,500 per mile to compute the allowance for refinishing," p. 7.

²⁶ Appellant's reply brief, p. 3, fn. 2.

²³ It is true that the parties have used the contractor's estimated rate of 10 percent in earlier computations. However, the present proceedings have revealed the precise data of an actual rate of overhead charged to the project. The actual rate is better evidence of appellant's entitlement to compensation than estimates.

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ing. Rather it presents evidence showing that appellant's method of finishing was abnormal, with the result that normal finishing costs do not apply. The parties jointly requested this new proceeding before the Board and limited the use of pre-existing records. Evidence presented in the current proceeding may not have been presented in the earlier proceedings. We cannot determine this to be the case without violating the restrictive stipulation of the parties accepted by the Board. The Government's evidence presented in the current proceedings showing that appellant's method of finishing was not normal does not contradict its earlier stipulation of normal finishing costs. It supplements the prior stipulation and deals with the applicability of normal costs to this project. We see no inconsistency. We find that appellant's finishing costs were $1\frac{1}{2}$ times normal finishing costs.

In accordance with the foregoing we compute the amount of compensation for restoration work as follows: ²⁷

Labor costs: Restoration and finishing	\$23, 360
Equipment operating costs: Restoration and finishing	17, 324
Equipment ownership costs: Restoration and finishing. Computed at 24.35% of the total of such costs	13, 095
Total Restoration and finishing costs	53, 779

²⁷ Totals are rounded off to nearest dollar.

Deduct finishing costs at \$5,250 per mile ($1\frac{1}{2}$ times normal costs) \times 5 miles ²⁸	26, 250
Overhead at 6.5%	=1, 789
	<hr/> \$29, 318

Conclusion

We find that appellant is entitled to compensation in the total amount of \$29,318 for restoration of damages resulting from the rains of June 11 and September 17, 1967.²⁹

RUSSELL C. LYNCH, *Member*.

I CONCUR:

G. HERBERT PACKWOOD, *Member*.

UNITED STATES

v.

J. L. BLOCK

12 IBLA 393

Decided August 28, 1973

Appeal from decision of Administrative Law Judge¹ Dean F. Ratzman (Nevada Contest No. N-066428) declaring mining claim null and void.

Affirmed.

²⁸ Appellant's figure of 5 miles of roadway remaining to be finished at the time of the June rain was corroborated in the earlier proceeding by the inspector. See transcript of hearing commencing June 17, 1969, pp. 173, 246-8. Also see Appellant's reply brief, p. 8.

²⁹ It is noted that appellant strongly objected to acceptance of and reliance on the testimony of Mr. Storley, the government's expert witness on the grounds that Mr. Storley is employed by the agency involved as a party. Inasmuch as our findings herein do not rely on testimony given by Mr. Storley, the objection is moot.

¹ The title of the hearing officer has been changed from "Hearing Examiner" to "Administrative Law Judge." 38 F.R. 10939.

Mining Claims: Contests—Mining Claims: Discovery: Marketability—Rules of Practice: Evidence—Rules of Practice: Government Contests—Rules of Practice: Hearings

Where a prima facie case rests upon the establishment of a negative fact, but the other party has peculiar knowledge or control of the evidence as to such matter, the burden rests upon him to produce such evidence of sufficient weight and credibility, and failing, the negative will be presumed to have been established. This principle applies in a mining claim contest to the extent that where the Government has made a prima facie case of nonmarketability, and the contestee only testifies that he made sales but fails to buttress that testimony with specific data as to the sales or provide corroborating evidence thereof, he will be deemed to have failed in his burden of proof.

Mining Claims: Discovery: Generally

Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would not be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine, a discovery does not exist within the meaning of the mining laws.

Mining Claims: Discovery: Marketability—Mining Claims: Common Varieties of Minerals: Generally

To satisfy the requirements for discovery on a placer mining claim located for common varieties of sand and gravel before July 23, 1955, it must be shown that the materials within the limits of the claim, by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, could have been extracted, removed, and marketed at a profit as of that date. Where a claimant fails to make such a showing, the claim is properly declared null and void.

Mining Claims: Determination of Validity

Where a mineral claimant has located a group of claims, he must show a discovery on each claim located to satisfy the requirements of the mining laws.

Mining Claims: Common Varieties of Minerals: Generally

To determine whether a deposit of sand and gravel is of a common or uncommon variety, there must be a comparison of the deposit with other deposits of similar type materials to ascertain whether the deposit has a property giving it distinct and special value. If the deposit is to be used for the same purposes as minerals of common occurrence, then there must be a showing that some property of the deposit gives it a special value for such use, and that such value is reflected generally by the fact that the material commands a higher price in the marketplace.

APPEARANCES: E. A. Hollingsworth, Esq., Reno, Nevada, for appellant; Otto Aho, Esq., Field Solicitor, Department of the Interior, Reno, Nevada, for appellee.

*OPINION BY MR. FISHMAN
INTERIOR BOARD OF LAND
APPEALS*

J. L. Block has appealed from a decision of Administrative Law Judge Dean F. Ratzman, dated April 28, 1972, declaring appellant's Community No. 3 placer mining claim null and void.

The Judge declared the mining claim null and void on the basis that there was no substantial evidence in the record to establish that the sand and gravel deposit on the claim was

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marketable at a profit prior to July 23, 1955.

The Community No. 3 placer mining claim was located for sand and gravel on November 20, 1946. The land embraced within the limits of the claim is described as the NE $\frac{1}{4}$ sec. 2, T. 21 S., R. 62 E., M.D.M., Clark County, Nevada. The claim is approximately 7 $\frac{1}{2}$ miles east of the center of Las Vegas on the western foot of the south end of Frenchman Mountain.

The Community No. 3 is one of eight contiguous placer claims which were located by one of appellant's predecessors in interest. The claims are referred to as the Community Nos. 1 to 8. The Community No. 2 claim was determined to be on privately owned land. The Community No. 6 was patented in 1967. The Community Nos. 1, 4, 5, 7, and 8 were declared null and void. *United States v. Stewart*, Contests Nos. N-062079 through 062084 (February 22, 1972).

The complaint, issued by the Bureau of Land Management on March 1, 1967, charged that minerals had not been found within the limits of the claim in sufficient quantity or quality to constitute a discovery, and that no discovery of a valuable mineral deposit had been made within the limits of the claim because the mineral materials present could not be marketed at a profit prior to the Act of July 23, 1955, or at the time of the contest. After several delays, a hearing was held on February 17, 1971.

Appellant argues that the find-

ings of the Judge are not supported by any probative evidence, and that the Judge failed to give proper weight to appellant's evidence. The only witness at the hearing was a mineral examiner, Thomas E. Schessler, who testified on behalf of contestant. Schessler examined the claims on two occasions in 1971. He testified that there was a large scraped area in the southwest corner of the claim from which he estimated over 35,000 yards of sand and gravel had been removed. On the basis of an aerial photograph taken on October 27, 1955, Schessler testified that the only work shown on the Community No. 3 claim at that time, aside from rills, was a small dip in the southwest corner extending over the boundary line of another claim immediately to the west. On the basis of two other aerial photographs taken on February 27, 1961, and October 4, 1964, Schessler concluded that no work had been done on the claim between 1955 and 1961, and that the 35,000 yards of sand and gravel had been removed between 1961 and 1964. He further testified that since October of 1964, nothing appeared to have been removed from the claim.

While Schessler was unable to determine the quantity of sand and gravel removed from the claim prior to 1955, contestee, in his deposition submitted after the hearing, asserted that there were "3,000 to probably 7,000 cubic yards sold." Contestee also asserted that substantial amounts of sand and gravel had

been removed from the claim since October of 1964.

Schessler testified that the sand and gravel found on the claim could be used for any purpose for which common varieties of sand and gravel are normally used. He stated that the normal uses for deposits of sand and gravel in the Las Vegas area were road construction, base and fill material, and concrete aggregate, and that the deposits were primarily fill-type material, except for that which is processed for concrete. He concluded that the sand and gravel on the Community No. 3 was a common variety.

In connection with the marketability of the material on the Community No. 3, Schessler was of the opinion that whatever market may have existed, was lost. He based his opinion on the small amount of material removed from the claim as evidenced by the 1955 aerial photograph. He also concluded that there was no apparent market for the material on the claim for a period of at least six years after October 27, 1955, since his examination and the aerial photographs showed no evidence of mining operations on the claim during that time. He testified on cross-examination that the market for sand and gravel in the Las Vegas Valley had almost doubled between 1955 and 1971, but that the growth in the market still had not generated production from the Community No. 3.

Based upon the evidence presented, the Judge found that the sand and gravel on the claim was a

common variety, and had not been demonstrated to have been marketable at a profit prior to July 23, 1955. The Judge's findings are supported by substantial and probative evidence. Moreover, our de novo consideration of the record impels us to reach the same findings.

Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine, a discovery exists within the meaning of the mining laws. *Castle v. Womble*, 19 L.D. 455, 457 (1894); *United States v. Coleman*, 390 U.S. 599 (1968). Common varieties of sand and gravel were withdrawn from location under the mining laws on July 23, 1955. 30 U.S.C. § 611 (1970). Consequently, to satisfy the requirements for discovery on a placer mining claim located for common varieties of sand and gravel before July 23, 1955, it must be shown that the materials within the limits of the claim, by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, could have been extracted, removed, and marketed at a profit as of that date. *Foster v. Seaton*, 271 F.2d 836 (D.C. Cir. 1959); *United States v. Humboldt Placer Mining Co.*, 8 IBLA 407, 79 I.D. 709 (1972).

In applying these tests to the facts of the case at bar, we conclude that appellant failed to demonstrate a discovery within the limits of the

Community No. 3 claim. While the evidence shows that some material was removed from the claim prior to 1955, the only evidence of sales was the testimony of appellant in his deposition. Appellant stated that there were "3,000 to probably 7,000 cubic yards sold," but offered no documentary or other evidence to substantiate his testimony; nor did appellant submit any evidence showing his cost or the price at which he assertedly sold the sand and gravel.

The following evidentiary rule has received judicial approbation in *Allstate Finance Corp. v. Zimmerman*, 330 F.2d 740, 744 (5th Cir. 1964):

Where the burden of proof of a negative fact normally rests on one party, but the other party has peculiar knowledge or control of the evidence as to such matter, the burden rests on the latter to produce such evidence, and failing, the negative will be presumed to have been established. [Citations omitted.]

In the case at bar, the Government does not have the risk of nonpersuasion, but only the obligation to make a prima facie case. A fortiori, the rule is even more binding here.

In *Fleming v. Harrison*, 162 F.2d 789, 792 (8th Cir. 1947), the court addressed itself to the requirement that a party, having evidence peculiarly within his knowledge or control, should adduce it, stating:

The applicable rule is stated in *Selma, Rome and Dalton Railroad Co. v. United States*, 139 U.S. 560, 567, 568, 11 S.Ct. 638, 640, 35 L.Ed. 266, as follows: "* * * While the general rule is that the burden of proof is where the pleadings place it,

namely, upon the party against whom judgment must go, if no evidence whatever is introduced, its application is often affected by circumstances. 'From the very nature of the question in dispute,' says Mr. Best, 'all, or nearly all, the evidence that could be adduced respecting it must be in the possession of, or be easily attainable by, one of the contending parties, who accordingly could at once put an end to litigation by producing that evidence; while requiring his adversary to establish his case, because the affirmative lay on him, or because there was a presumption of law against him, would, if not amounting to injustice, at least be productive of expense and delay. In order to prevent this, it has been established as a general rule of evidence that the burden of proof lies on the person who wishes to support his case by a particular fact which lies more peculiarly within his knowledge, or of which he is supposed to be cognizant.' 1 Best, Ev. § 274; 1 Greenl. Ev. § 79; 2 Starkie Ev. 589." See, also, *United States v. Denver & Rio Grande Railroad Co.*, 191 U.S. 84, 92, 24 S.Ct. 33, 48 L.Ed. 106; *Mammoth Oil Co. v. United States*, 275 U.S. 13, 51, 53, 48 S.Ct. 1, 72 L.Ed. 137; *Board of Commerce v. Security Trust Co.*, 6 Cir., 225 F. 454, 459, 20 Am. Jur., Evidence, § 139, page 145; 31 C.J.S., Evidence, § 113, p. 721.

This principle applies in a mining claim contest to the extent that where the Government has made a prima facie case of nonmarketability, and the contestee only testifies that he made sales, but fails to buttress the testimony with specific data, or provide corroborating evidence thereof, he will be deemed to have failed in his burden of proof.

Appellant argues that the Judge erred in finding that the claim was too far from a paved road for the sand and gravel to be sold competitively; however, the mineral

examiner's testimony is a sufficient predicate for the Judge's finding. Moreover, appellant offered no evidence to demonstrate that the sand and gravel from the Community No. 3 could have been sold competitively.

Appellant takes issue with the position of the Department in requiring a mining claimant to demonstrate a discovery on each claim, and asserts that there is no authority outside the Department for such a position. Appellant's theory of the case appears to be that the Community No. 3 must be considered as an integral part of one "mining claim" embracing the group of Community claims, and that only one discovery need be demonstrated on the group of claims to establish the validity of each location.

Appellant's position is untenable. The Act of May 10, 1872, 17 Stat. 91, 30 U.S.C. § 23 (1970), provides in part that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." The Act of March 3, 1891, 26 Stat. 1097, 30 U.S.C. § 35 (1970), provides in part that "[c]laims usually called 'placer' * * * shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims * * *."

Where, as here, a mineral claimant or his predecessor in interest has located a group of claims, he must show a discovery on each claim located to satisfy the requirements of the mining laws. *United States v.*

Bunkowski, 5 IBLA 102, 79 I.D. 43 (1972). It is not enough to offer evidence for the claims as a unit. *United States v. Chas. Pfizer & Co., Inc.*, 76 I.D. 331 (1969).

While we recognize the difference between the terms "location" and "mining claim," and that the terms are used interchangeably the mining laws clearly require that a discovery is essential for each location. 30 U.S.C. § 23 (1970) and 30 U.S.C. § 35 (1970); *United States v. Bunkowski*, *supra*; *Steele v. Tanana Mines R. Co.*, 148 F. 678 (9th Cir. 1906); *Unita Tunnel, Min. & Transp. Co. v. Ajax Gold Min. Co.*, 141 F. 563 (8th Cir. 1905); *Lindley on Mines*, 3d Ed., §§ 437, 438. The discovery of mineral on one claim will not support rights to another claim or group of claims even though the claims are contiguous. *Ranchers Exploration & Development Co. v. Anaconda Co.*, 248 F. Supp. 708 (D.C. Utah 1965).

Appellant argues that the Judge erred in concluding that the deposit of sand and gravel on the claim was a common variety. In support of his argument appellant asserts that the pleadings do not raise the issue of whether the material on the claim is of a common or uncommon variety.

The complaint charged in part that:

No discovery of a valuable mineral has been made within the limits of the claim because the mineral materials present cannot be marketed at a profit and/or could not be marketed at a profit prior to the Act of July 23, 1955. (Italics added.)

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The Act of July 23, 1955, 69 Stat. 368, as amended, 30 U.S.C. § 611 (1970), provides in part:

No deposit of common varieties of sand * * * gravel * * * shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws. * * * "Common varieties" * * * does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value * * *.

Appellant denied the allegation in his answer but made no countercharge that the materials within the limits of the claim were of an uncommon variety or that the materials were valuable because the deposit had some property giving it distinct and special value.

In our view, the pleadings raised the issue of whether the material on the claim was of a common or uncommon variety. Contestant made its allegation and referred to the Act of Congress which removed common varieties of sand and gravel from location under the mining laws. The language in the complaint charging that the materials present within the limits of the claim could not be marketed at a profit *prior* to the Act of July 23, 1955, only has meaning if the materials referred to are considered as common varieties.

Appellant next argues that the patenting of the Community No. 6, which has embraced within its limits deposits of sand and gravel comparable to those of the Community No. 3, conclusively demon-

strates that the sand and gravel on the Community No. 3 is of an uncommon variety.

The record supports the assertions made by appellant that the Community No. 6 was patented, and that the sand and gravel on the two claims is comparable. It does not follow, however, that the sand and gravel on either claim is of an uncommon variety. Since the Community No. 6 was located before the Act of July 23, 1955, *i.e.*, before common varieties of sand and gravel were removed from the coverage of the mining laws, it was not necessary, as a prerequisite for patent, to establish that the sand and gravel on the Community No. 6 was of an uncommon variety.

As stated in *United States v. U.S. Minerals Development Corporation*, 75 I.D. 127 (1968), the Department interprets the 1955 Act as requiring uncommon varieties of sand and gravel to meet two criteria: (1) that the deposit have a unique property, and (2) that the unique property give the deposit a distinct and special value. In order to determine whether a deposit of sand and gravel has a unique property which gives it a distinct and special value, there must be a comparison of the material under consideration with other deposits of similar materials. Therefore, it must be shown that the material under consideration has some property which gives it value for purposes for which other materials are not suited, or if the material is to be used for the same pur-

poses as other materials of common occurrence, that it possess some property which gives it a special value for such uses, which value is generally reflected by the fact that it commands a higher price in the market place. *United States v. California Soyland Products, Inc.*, 5 IBLA 179 (1972). See *United States v. Thomas*, 1 IBLA 209, 78 I.D. 5 (1971).

The Judge found that the material on the Community No. 3 could be used for the normal and general uses for which sand and gravel are utilized in the Las Vegas area, and that the material had no unique property. He concluded that the material was a common variety under the Act of July 23, 1955. The findings and conclusions of the Judge are supported by the testimony of the mineral examiner who testified on behalf of contestee. While appellant takes issue with these findings and conclusions, appellant presented no convincing evidence in rebuttal.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

FREDERICK FISHMAN, *Member*.

WE CONCUR:

MARTIN RITVO, *Member*.

JOAN B. THOMPSON, *Member*.

MYERS COAL COMPANY

2 IBMA 167

Decided: August 29, 1973

Appeal by Myers Coal Company from a decision dated May 21, 1973, in Docket No. HOPE 71-162-P, by Administrative Law Judge Richard C. Steffey, assessing a civil monetary penalty of \$167 for fifteen alleged violations of the Federal Coal Mine Health and Safety Act of 1969 at appellant's No. 2 Mine.

Affirmed.

Federal Coal Mine Health and Safety Act of 1969: Appeals: Generally

Where the Administrative Law Judge has taken into consideration mitigating circumstances advanced by the operator in determining the assessment of penalties, and where appellant's arguments have been fully and fairly considered by the Judge, the Board will not disturb the Administrative Law Judge's decision.

APPEARANCES: Brooks E. Smith, Esquire, of Dailey & Smith, Kingwood, West Virginia, Attorney for appellant, Myers Coal Company; Hugh O'Riordan, Trial Attorney for appellee, Mining Enforcement and Safety Administration (MESA), formerly U.S. Bureau of Mines.

INTERIOR BOARD OF MINE OPERATIONS APPEALS

DECISION

Having reviewed the record and considered the brief of the appel-

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lant and the response thereto by MESA, the Board finds that Myers Coal Company has not demonstrated any reason why the findings of fact, conclusions of law, and decision of the Administrative Law Judge should not be affirmed.¹ The record supports the decision and order of the Judge and the amounts assessed for each of the fifteen violations of the Act are reasonable and in accord with the intent and purposes of the Federal Coal Mine Health and Safety Act of 1969.² Furthermore, the arguments made on appeal to the Board have been fully and fairly considered by the Judge and the resultant assessments have taken into account all the mitigating circumstances advanced by the appellant.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS ORDERED:

(1) that the decision of the Administrative Law Judge issued May 21, 1973, assessing Myers Coal Company civil penalties in the total amount of one hundred sixty-seven (\$167) IS HEREBY AFFIRMED;

(2) that Myers Coal Company pay the penalties assessed on or before 30 days from the date of this decision; and

(3) that the Notice of Violation No. 4 DCM, May 8, 1970 IS VACATED.³

C. E. ROGERS, JR., *Chairman.*

DAVID DOANE, *Member.*

DECISION

Pursuant to written notice dated December 21, 1972, a hearing in the above-entitled proceeding was held on February 20, 1973, in Morgantown, West Virginia, under section 109 of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 819 (1970).

General Considerations

The issues involved in this proceeding are whether violations of any mandatory health or safety standards occurred and, if so, what monetary penalties should be assessed.

Four of the factors which must be considered under section 109(a)(1) of the Act in assessing penalties may be given a general evaluation, while the remaining two criteria, *viz.*, the gravity of the violation and whether the operator was negligent, should be considered specifically in reviewing the evidence presented with respect to each violation. The criteria which usually may be given a general review will be evaluated first.

³ The Board notes that while the proceeding as to this notice was dismissed by the Judge, in an apparent oversight, he failed to order the notice vacated. For clarification of the ultimate disposition of this particular notice, the Board orders it vacated.

¹ The Judge's decision follows at 2 IBMA 170, 80 I.D. 579 (1973).

² P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

History of previous violations

This proceeding involves five inspections of Respondent's Mine No. 2 over a seven-month period. Those inspections included the first inspection of Respondent's mine under the Act and the mine was closed shortly after the last inspection. Only sections 305(k) and 305(1) of the Act are cited twice in the 16 notices of violation which support the Bureau's Petition for Assessment of Civil Penalty. The criterion of history of previous violations will hereinafter be considered to the extent that such a history has been established in this proceeding by the alleged repetitious violations of sections 305(k) and 305(1).

Appropriateness of the penalty to the size of operator's business

Respondent's mine was a small drift mine which in the last year of operations produced from 25 to 50 tons of coal daily from the Upper Freeport seam which averaged about 48 inches in thickness. Some entries extended only 100 feet from the surface, but the main haulage-way was about 1,000 feet in length. Three or four men were employed underground to perform conventional mining, utilizing a cutting machine, a loading machine, and battery-operated locomotives (Tr. 83; 132). On the basis of the foregoing facts, I find that Respondent's mine was small and therefore would appropriately be subject to assessment of relatively low penalties.

Effect of penalties on operator's ability to continue in business

The operator of Mine No. 2 was an individual doing business as Myers Coal Company (Tr. 128). His primary source of income is as an administrator of public transportation in the Preston County, West Virginia, School System (Tr. 129; 164). Additionally, he operates a combination grocery store and service station in Howesville, West Virginia (Tr. 141). He had attempted to keep the mine operating in order to provide employment for three or four men if he could have done so without requiring his other endeavors to subsidize the coal business (Tr. 142). In 1958 his wife, who had previously assisted in operating the various enterprises, was maimed for life in an auto accident involving an uninsured motorist and he has never recovered from the financial losses associated with that unfortunate occurrence (Tr. 130).

About four years ago he borrowed heavily to purchase mechanized equipment in an effort to make the mine an economic operation, but the mine became increasingly expensive to operate under the Act so that he had to close it on December 30, 1970, while still owing \$15,000 on the equipment (Tr. 143). Also in 1970 he had to obtain a \$20,000 mortgage on his home in order to meet the payroll and other operating expenses associated with the mine and to replace and maintain trucks used to haul coal (Tr. 144; 164).

In 1966 he obtained mine foreman's papers so that he could make preshift examinations and save the expense of hiring a foreman for the mine, but even with that extra effort to reduce operating expenses, he has been unable to make any money from mining since 1968 (Tr. 129; 143; 167). He finally had to close the mine with several outstanding violations uncorrected because he could not afford to buy the equipment necessary to abate them. He is continuing to make payments on the mining machinery and, if he could recover from his monetary losses sufficiently, he would like to reopen the mine (Tr. 145; 168). The uncertainty associated with the amount that he might have to pay in civil penalties because of the notices of violation involved in this proceeding was a factor in his decision to close the mine before his losses increased to any larger amount than they already had.

On the basis of the foregoing facts, I find that payment of large penalties would have an adverse effect on Respondent's ability to reopen his mine.

Good faith effort to achieve rapid compliance

The inspectors testified that Respondent demonstrated a good faith effort to achieve rapid compliance with the Act in that violations were corrected shortly after they were called to Respondent's attention, except in those cases where the materials to abate the notices were difficult to obtain (Tr. 16; 20; 25; 28;

101). Therefore, full consideration for this mitigating factor will be given in assessing civil penalties.

Consideration of Remaining Factors

As indicated above, two of the criteria under section 109(a)(1), i.e., gravity of the violations and whether the operator was negligent, must be specifically considered in reviewing the evidence presented by both the Bureau and Respondent with respect to each alleged violation. The discussion of the evidence, findings as to actual occurrence of the alleged violations, and assessment of penalties will hereinafter be considered in the sequence that evidence concerning them was introduced at the hearing.

Notice No. 1 DCM 5/8/70 § 303 (b) (An air reading could not be obtained with an anemometer near the faces of the three working places in the main entries section)

The inspector testified that he issued the notice because he could obtain no anemometer reading near the working faces. The Act requires delivery of 3,000 cubic feet of air per minute to the working faces. The air deficiency was caused by the operator's failure to erect brattices from the last open crosscut to within 10 feet of the working faces. Although the operator had some brattice material on hand, he did not have enough to provide adequate ventilation until additional material had been purchased. The inspector believed that the operator should

have been able to prevent this particular condition from happening since the materials were readily available on the market and there was no reason for the operator to have been unaware of the requirements concerning adequate ventilation. The danger to the miners is that noxious fumes and gases are not quickly eliminated from the mine and the men are exposed to unhealthy air and the possibility of an explosion if methane should be encountered (Tr. 12-14).

The mine foreman testified that only timbers were used as roof support in the mine and that there was so little clearance between the loading machine and the timbers, that they did not erect the brattices until the loading machine had been moved into position so as to avoid knocking down the timbers on the other side of the brattice (Tr. 106-108). The mine foreman, however, agreed that the brattices were not up at the time the inspection was made and that no air reading could be obtained near the faces (Tr. 113-114).

I find that the violation occurred, that it was serious, and that the operator was negligent. Even if justification could be found for waiting until the loading machine is moved into position before erecting the brattices, the fact that the operator did not have on hand enough material to abate the violation the same day it was written is an indication that coal was normally removed without the erection of proper brattices. A penalty of \$25 will be assessed for this violation.

Notice No. 2 DCM 5/8/70 § 305(k)
(The insulated power cable installed along the main haulageway was not supported by approved-type insulators and was in contact with combustible materials (posts) for a distance of about 300 feet.)

The inspector testified that the insulated power cable along the haulageway was not supported by the proper type insulators and, at various locations, the insulated cable was in contact with posts. The inspector said that although the cable was insulated, the insulation could become worn and cause a fire hazard if the bare wires should come in contact with combustible materials. Insulators, according to the inspector, were not difficult to obtain (Tr. 14-16). The inspector stated that the insulated wires were supported by J hooks which were considered adequate insulation prior to passage of the Act, but now the Bureau will accept only a porcelain-type insulator (Tr. 48-49).

The mine foreman testified that they had supported the insulated wires on nail knobs which are made of porcelain, but that they sometimes had to put a piece of insulated wire around the power wire to hold it on the insulators. He claims that nail knobs were approved by the Bureau then and that such insulators are being used with the Bureau's approval at the present time (Tr. 108).

Respondent's counsel moved that the Bureau's Petition for Assessment of Civil Penalty be dismissed insofar as it alleged a violation of

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section 305(k) of the Act on the ground that the Act does not define what "approved-type insulators" are and that the Respondent was using insulators which were adequate under section 305(k). The inspection involved here occurred less than two months after the Act became effective. At that time the operator was probably justified in assuming that J hooks would be considered "well-insulated insulators" under the Act, but section 305(k) also provides that power wires "* * * shall not contact combustible material, roof, or ribs." Since the mine foreman and the inspector both agreed that the insulated wires were touching the posts in the mine (Tr. 15; 108), there can be no doubt but that the notice here involved appropriately cited Respondent for violating section 305(k) of the Act. In view of the possible confusion as to what type of insulator the Bureau might have approved, Respondent's motion to dismiss is granted to the extent Notice No. 2 DCM cited Respondent for failing to use "approved-type insulators."

Insofar as the notice alleged that the insulated power cable was touching posts in the mine, I find that the violation occurred, that it was serious, and that the operator was negligent. A penalty of \$15 will be assessed for this violation.

Notice No. 3 DCM 5/8/70 § 305(1)
(There were 300 feet of bare feeder wire installed along the main haulageway.)

Notice No. 2 DCM 8/31/70 § 305(1)
(There were 250 feet of bare feeder wire installed along the main haulageway.)

The above two notices are being considered simultaneously because of the operator's contention that the inspector issued two notices concerning the same section of bare feeder wire.

The inspector testified that under the Act no bare wire is allowed along the main haulageway except for trolley haulage. The danger of the bare wire was that it was conducting electricity and therefore produced potential shock and fire hazards (Tr. 16-18). The inspector said that the required insulated wire was difficult to obtain and Exhibit 6 shows that the inspector extended the time for abatement indefinitely until such time as the operator could obtain the insulated cable (Tr. 18). The inspector's testimony in support of the second violation was substantially identical with that for the first and he was of the opinion that both were serious violations (Tr. 25-26).

Concerning Notice No. 3 DCM dated May 8, 1970, the mine foreman testified that they normally used bare wire in the mine and then covered it with plastic pipe and that they had erected the bare wire found by the inspector, but had not yet had time to cover the bare wire with plastic pipe (Tr. 110).

Although all witnesses agree that the facts support the inspector's writing of the first notice concern-

ing installation of bare feeder wire, Respondent claims that the inspector's second notice was written for the identical section of bare wire which was involved in the first notice of violation. The operator seemed to be certain that the same section of wire was involved because he testified that the trailing cables were hooked to the terminal point of the bare feeder wire and that the same connections for the trailing cables were being used when the inspector checked the mine on August 31, 1970, that were being used when the mine was inspected on May 8, 1970 (Tr. 134-135). The operator stated that when he went to the mine following issuance of the second notice of violation, he found all the wires covered. He concluded, therefore, that the only way the inspector could possibly have found bare wires in the mine on two different occasions would have been for the men to have uncovered the same section of wire to attach a piece of equipment to it, and for the inspector to have arrived for an inspection at the very time when the men might have temporarily uncovered the same section of wire, because all the wire was covered when he went to the mine to inspect it on the day following the issuance of the second notice (Tr. 147-149).

The inspector claimed that two entirely different sections of bare wire were involved. He said that the first notice was written for a section of bare wire extending from the portal inby for a distance of 300 feet. The second notice was written for a section of bare wire which

commenced 1,000 feet from the place where the first section of bare wire had been found (Tr. 61-62).

The mine foreman's testimony tends to support the inspector's in that he said there was a section of insulated wire extending 300 feet from the portal inby for 300 feet and then the bare wire commenced and extended 300 feet from that point (Tr. 117). Since the operator only hired a mine foreman for a portion of the time during which inspections were made, the mine foreman was not at the mine when the second notice was issued and therefore could not express any opinion as to whether the two notices were written for the same section of bare wire.

I find that both violations regarding the existence of bare wire occurred. The mine foreman's testimony supports the inspector's description of the location of the first section of bare wire. Since the operator was apparently not making daily inspections of the mine during the time that he had a mine foreman working for him, it would have been easy for him to have assumed that the two notices dealt with the same section of bare wire.

Respondent's motion to dismiss the first notice of violation of section 305(1) because of the unavailability of material is denied. The mine foreman testified that it had been their practice to cover the bare wire with plastic pipe and that the plastic pipe had not been put over the bare wire, although it had been energized, at the time the condition

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was found by the inspector (Tr. 115-116). Since the mine foreman testified that he had plenty of plastic pipe on hand for use in covering the bare wire, Respondent's argument about the unavailability of materials is not supported by the facts in this instance. While there is some doubt in the record that the inspector was willing to accept plastic pipe covering for abatement of the notice once it had been written (Exh. 6), the testimony of both the inspector and mine foreman shows that the existence of bare wire without any plastic covering was the cause of the writing of the notice of violation (Tr. 16-17; 59; 62; 110-111; 117). Moreover, the mine foreman seemed to be certain that the notice would not have been written if the men had not been using the bare wire without first covering it with plastic pipe (Tr. 110-111).

In arriving at a proper assessment for the first violation, I find that the violation was not serious because the inspector indefinitely extended the time for abatement. The operator was negligent in using the bare wire without first covering it with the plastic pipe which had been purchased for that purpose. A penalty of \$15 will be assessed for the first violation.

The second violation of section 305(1) was more serious than the first because the operator had by that time obtained insulated wire and was able to abate the second notice within a few hours after it was issued (Exhs. 14 and 15). The

operator was negligent in using bare wire on two successive occasions. A penalty of \$25 will be assessed for the second violation.

Notice No. 4 DCM 5/8/70 § 316 (Telephone service was not provided underground.)

The Act requires that a communication system be established between the working area and the surface. Since there was no telephone or other means of communication, the inspector issued the notice of violation. The reason for the requirement is that a means of communication with the surface is important in emergencies. Telephone equipment was hard to obtain and the time for abatement was extended indefinitely. The operator did eventually obtain and install a telephone before the mine was closed (Tr. 21-22).

The mine foreman testified that a new portal had been opened into the mine and that the working faces where the men were employed at the time the notice was written was no more than 100 feet from the surface (Tr. 112; 121). Section 316, which is here involved, requires that a telephone "shall be provided between the surface and each working section of any coal mine that is more than one hundred feet from a portal."

While the inspector seems to have written the notice of violation on the assumption that the 1,000-foot haulageway was the controlling feature of the mine which required the

installation of a telephone, the fact remains that the Act itself does not require one unless the working section is more than 100 feet from a portal. Since the inspector's testimony does not controvert the mine foreman's claim that the working section was within 100 feet of the new portal which was open at the time the notice was written, I find that Respondent was not obligated under section 316 to install a telephone in its mine. Therefore, the Bureau's Petition for Assessment of Civil Penalty will be dismissed insofar as it alleged a violation of section 316 of the Act.

Notice No. 1 DCM 8/31/70 § 202(a)
(Means to implement a respirable dust sampling program, such as sampling equipment, have not been provided at this mine.)

The inspector testified that he issued this notice of violation because the operator had not established a program to test for environmental dust (Tr. 23-24). The evidence shows that this particular violation was not particularly serious in the circumstances since the operator was using proper ventilation procedures in its mine at this time and the mine was not a dusty mine which would have unduly exposed miners to lung diseases (Tr. 146). The inspector stated that dust-sampling equipment was hard to obtain at the time and that it was necessary to give the operator an extension of time until October 23, 1970, within which to implement a dust-sampling program (Exh. 13).

The operator testified that he attended the Bureau's dust-sampling course in Pittsburgh from July 22 through July 24, 1970, and was issued a certificate showing that he is qualified to take dust samples in a coal mine (Tr. 131). He had already obtained the equipment to take dust samples prior to July 1970, but he was unable to obtain the cassettes until the time he instituted the dust program in October (Tr. 146).

Respondent's counsel moved to dismiss the Bureau's Petition for Assessment of Civil Penalty with respect to this violation because of the operator's inability to obtain the dust-sampling equipment prior to the time of the inspection (Tr. 53). Counsel argues that under Part 100 of the Department's Regulations, absence of fault is a ground for not assessing any penalties. Aside from the fact that Part 100 of the Regulations has been suspended until further notice (38 F. R. 10085, April 24, 1973), that Part of the Regulations was promulgated to explain principles which would be used by the Assessment Officer in preparing proposed orders of assessment. Even if Part 100, upon which Respondent's counsel relies, were applicable to the violations alleged in this proceeding, the evidence would not support utilization of the no-fault provision of Part 100 for the reason that the inspector testified that the notices were issued only when the equipment was available at the time the notices were issued (Tr. 86-87). While the inspector also testified that some of the

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materials and equipment were hard to obtain, that in itself is not a reason to vacate the notices of violation. For example, even though the operator testified that he showed the inspector the dust-sampling equipment which he had at the time the notice was issued, the inspector testified that he believed the operator was negligent in not having tried harder than he did to get the missing cassettes before the notice was written (Tr. 24).

Part 100, even before it was suspended, was not in my opinion applicable to the assessment of penalties following a hearing held under section 109 of the Act. Even if Part 100 were applicable, however, the evidence in this proceeding fails to show conclusively that Respondent could not have obtained cassettes for its dust-sampling equipment prior to the time the notice of violation was written if an earlier and greater effort to obtain cassettes had been made. Therefore, Respondent's motion to dismiss the Bureau's Petition insofar as it alleged a violation of section 202(a) is denied. The other motions by Respondent's counsel to dismiss the Bureau's Petition with respect to other violations concerning the Respondent's alleged inability to purchase materials and equipment are denied for the same reasons expressed above (Tr. 67; 72; 77; 97).

In such circumstances, I find that the violation occurred and that it was not serious since Respondent was observing proper ventilation procedures. In view of the fact that

Respondent attended the Bureau's course to learn how to take dust samples and did have all of the equipment except the cassettes at the time of the inspection, it would appear that Respondent was guilty of only a very technical violation in this instance. Therefore, a penalty of \$1 will be assessed for this violation.

Notice No. 1 DCM 11/12/70 § 305 (k) (The insulated power cable, installed along the haulageway for a distance of 600 feet, was not supported by approved-type insulators.)

The inspector testified that the operator had used nail-knob insulators in some places and that he was willing to accept those as approved-type insulators where they had been used. The primary reason, however, for the inspector's having written the notice was the fact that the operator had used such a few insulators that the wire had been allowed to sag and touch combustible materials so as to create a shock or fire hazard (Tr. 26-28; 64).

Respondent's motion to dismiss the Bureau's Petition for Assessment of Civil Penalty with respect to this violation on the ground that the Act does not define "approved-type insulators" is denied because the nature of the violation was in allowing the insulated power wires to come in contact with combustible materials. As indicated *supra*, Respondent was previously cited on May 8, 1970, for allowing power wires to touch combustible materials. It is appropriate to con-

sider the history of a previous violation in assessing a penalty for this second violation of section 305(k).

I find that the violation occurred, that it was serious, and that the operator was negligent. A penalty of \$25 will be assessed for this violation.

Notice No. 2 DCM 11/12/70 § 306

(b) (*Automatic circuit breakers were not provided for the trailing cables of the cutting machine and loading machine.*)

The inspector testified that he issued this notice because the operator was using a fuse instead of a dual element fuse or automatic circuit breaker as required by the Act. Automatic circuit breakers were hard to obtain at this time and Respondent's mine was closed on December 30, 1970, before this alleged violation was ever corrected (Tr. 28-30). The operator testified that he had tried to purchase automatic circuit breakers from Atlas Supply and Equipment Company in Clarksburg, West Virginia, and was told that they were unavailable (Tr. 137).

I find that the violation occurred. The fact that the operator was permitted to keep operating with fuses shows that the violation was not serious. The difficulty of obtaining the automatic circuit breakers shows that the operator was not negligent. A penalty of \$5 will be assessed for this violation.

Notice No. 3 DCM 11/12/70 § 306

(d) (*There were four and eight splices in the trailing cables of the*

loading machine and cutting machine, respectively.)

The Act provides that only one temporary splice may be made in a trailing cable within a 24-hour period. When the inspector found four and eight temporary splices in the trailing cables to the loading machine and cutting machine, respectively, he issued the notice of violation. While the notice itself does not use the word "temporary," the inspector said he made it clear to the operator that except for one temporary splice in a 24-hour period, the Act requires permanent or vulcanized splices (Tr. 34). The inspector stated that it was difficult to obtain the equipment to make vulcanized splices at this time.

Respondent's counsel moved that the Bureau's Petition for Assessment of Civil Penalty be dismissed insofar as it sought assessment of a penalty for violation of section 306 (d) because the notice failed to state specifically that temporary splices were involved. The operator testified that he was aware that the notice was directed to the fact that his splices were of the temporary type prohibited by the Act (Tr. 153). Since the operator's own testimony shows that he fully understood the nature of the violation for which he was being cited when the notice was issued, counsel's motion to dismiss for failure of the inspector to use the word "temporary" in the notice is denied.

Respondent's counsel also moved that the Bureau's Petition be dismissed insofar as it relates to re-

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quests for assessment of penalties for violations of sections 306(d) and 307(b) of the Act because they were issued during the effectiveness of the *Ratliff* injunction¹ as informational notices and carried notations on them assuring the operator that no penalties would be assessed because of the alleged violations cited in the notices. Counsel's argument is appealing at first impression, but examination of the factual situation existing at the time the notices were issued shows that the argument is not well founded.

The facts are that the inspector first noted violations of sections 306(d) and 307(b) on May 8, 1970. At that time he wrote "informational" notices, viz., Notice No. 5 DCM 5/8/70 § 306(d) and Notice No. 6 DCM 5/8/70 § 307(b), stating that because of the *Ratliff* injunction, no penalty would be assessed (Tr. 78-79). The inspector further explained that if the operator did not correct the violations noted in the informational notices, additional notices were thereafter issued making it clear that penalties would be assessed after materials and equipment required to abate the violations became available for purchase by the operator.

The informational notices, in such circumstances, did not prejudice the operator, but instead had the effect of giving him a period of

time during which he could try to correct the violations before they were written as notices of violation which would involve assessment of civil penalties. The inspector's testimony at pages 87 and 88 of the transcript shows beyond any doubt that he would not have issued notices citing violations of sections 306(d) and 307(b) of the Act if the conditions which caused the writing of the informational notices had not continued to exist at the time the notices were written in a form requiring assessment of civil penalties. Therefore, Respondent's motions to dismiss the Bureau's Petition with respect to violations of sections 306(d) and 307(b) of the Act are denied.

I find that the violation of section 306(d) occurred. Since both the inspector and operator agreed that the temporary splices here involved were unusually well made and since the inspector allowed the operator to continue using the cutting and loading machines with a large number of temporary splices for about seven months before the mine was closed, the record will not support a finding that the violation was serious. The operator's alleged inability to procure vulcanizing equipment supports a finding that no negligence was involved. Therefore, a penalty of \$5 will be assessed for this violation.

Notice No. 4 DCM 11/12/70 § 307(b) (The metallic frames of the cutting machine and loading machine were not grounded.)

¹ *A. H. Ratliff, Jr., t/a Diltson Coal Company, et al. v. Walter J. Hickel, Secretary of the Interior, et al.*, Civil Action No. 70-C-50-A, U.S. District Court for the Western District of Virginia, Orders issued April 23 and April 30, 1970.

The inspector testified that the only wires connected to the cutting and loading machines were the positive and negative wires, whereas the Act requires that the frames of the machines be grounded so that if a wire becomes exposed, the frames of the machines will not become energized and create an electrical shock hazard. The inspector said that the cable required to ground the equipment was hard to obtain and the notice never was abated before the mine was closed on December 30, 1970 (Tr. 36-38; 72).

I find that the violation occurred. The granting of the extensions of time within which to comply will not support a finding that the violation was serious. The difficulty of being able to purchase the required cable supports a finding that the operator was not negligent. A penalty of \$5 will be assessed for this violation.

Notice No. 1 DCM 11/13/70 § 305 (g) (Due to defective light switches and wiring, the headlights were inoperative on the two battery-powered locomotives.)

The inspector testified that the headlights on the locomotives were inoperative because of defective wiring. He said that he thought this was a serious violation because it reduced the machine operator's ability to see and also it decreased the machine's visibility to those working in the mine. He said the operator was negligent in allowing this condition to exist (Tr. 39-40).

The operator testified that the machines had no defective wiring

on them whatsoever and that the sole cause of the headlights' breaking was that they were mounted so close to the floor of the mine that water would fly up on the hot surface of the headlights and cause them to burst. The violations were abated by moving the headlight mounts to the top of the locomotives so that water would not be as likely to hit them. Also the type of headlight was changed to a sealed unit which was less likely to break from exposure to water (Tr. 139-140; 155-156).

I find that the violation occurred and that it was somewhat serious since lack of headlights increased the probability of an injury to miners working around the locomotives. The operator was negligent since his own testimony shows that when a headlight would become broken during a producing shift, the men would not take time out to replace the bulb (Tr. 161-162). Section 305(g) clearly provides that " * * * When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected." Therefore, a penalty of \$25 will be assessed for this violation.

Notice No. 3 DCM 11/13/70 § 317 (1) (Sanitary toilet facilities were not provided underground.)

The inspector issued this notice because sanitary toilet facilities were not available at the mine, but he agreed that sanitary toilets were hard to obtain at the time he wrote the notice (Tr. 40). The operator

had been unable to purchase the sanitary toilets in Clarksburg (Tr. 140).

I find that the violation occurred, that it was nonserious, and that the operator was not negligent. A penalty of \$1 will be assessed for this violation.

Notice No. 3 DCM 11/13/70 § 317 (n) (Self-rescue devices were not provided for the underground employees.)

The inspector issued this notice because the men working underground did not have self-rescue devices. The men need these to protect them from carbon monoxide in the event a fire should occur in the mine. The inspector said that the self-rescuers were hard to obtain at this time (Tr. 40A-41). The operator testified that he had unsuccessfully tried to purchase self-rescuers in Clarksburg and Morgantown, West Virginia (Tr. 140).

I find that the violation occurred, that it was serious, and that the operator was not negligent. Despite the seriousness of the violation, it would be unfair to assess a large penalty for an item which was hard to obtain at this time. Therefore, a penalty of \$5 will be assessed for this violation.

Notice No. 4 DCM 11/13/70 § 317 (s) (Drinking water was not kept available underground.)

The inspector issued this notice because the operator did not keep a supply of water underground for use by the miners in an emergency. The inspector stated that the miners

had their own individual water in their dinner pails, but the Act requires that an adequate supply of water be "stored" underground in addition to that carried by the individual miners (Tr. 41-42).

The operator stated that there was a well at the portal of the mine and that the water had been tested and approved by the health department. He said that he had placed an order for a sanitary container for storage of water underground but that the order was never filled and the mine was closed before the container was obtained (Tr. 141-142; 157-158).

I find that the violation occurred, that it was not serious in a mine whose working faces were within 100 feet of the surface, and that the operator was not negligent. A penalty of \$5 will be assessed for this violation.

Notice No. 1 MM 12/16/70 § 303(o) (A ventilation system and methane and dust control plan has not been submitted to the District Manager for approval.)

The inspector testified that this notice was issued after the subdistrict office at Mount Hope issued a list of mine operators who had not submitted ventilation system and methane and dust control plans for approval of the Bureau. His duty was to visit the mines for which no plan had been received. The plans were required so that the Bureau could determine whether the ventilation systems in the mines were properly designed and were ade-

quate for removal of methane and control of dust in the mines (Tr. 93-95). The operator submitted such a plan and it was approved by the Bureau in a letter to Respondent dated March 4, 1971 (Tr. 96). The inspector said that the failure to submit the plan was not serious so long as the mine actually had a satisfactory ventilation system. The inspector was unaware of any defects in Respondent's ventilation system at the time the notice was issued (Tr. 100).

I find that the violation occurred, that it was nonserious in the circumstances, and that the operator was not negligent since the inspector said that delays in submission of the plans were often caused by the backlog of work to be done by the engineers who prepared mine maps which were useful in submission of the plans. A penalty of \$5 will be assessed for this violation.

Notice No. 2 MM 12/16/70 § 303(t)
(A fan stoppage plan has not been submitted to the District Manager for approval.)

The inspector said that the sub-district office at Mount Hope issued a list of mine operators who had not submitted the fan-stoppage plan. Among the mines which he was required to visit in connection with failure to submit the plan was Respondent's Mine No. 2. He did not think that failure to submit the plan was serious so long as the operator knew what to do and was prepared to take appropriate steps in the event the mine fan should stop. The inspector said he had no

reason to doubt that the operator in this instance would have withdrawn men from the mine if the mine fan had stopped and would have taken the required preliminary examinations before permitting men to re-enter the mine following a fan stoppage (Tr. 95-99). The fan-stoppage plan was submitted by the operator within three days after the notice was written (Tr. 101).

I find that the violation occurred, that it was nonserious, and that the operator was not negligent. A penalty of \$5 will be assessed for this violation.

Summary of Assessments, Dismissal, and Conclusions of Law

On the basis of all the evidence of record and the foregoing findings of fact, the Respondent is assessed the following penalties:

Notice No. 1 DCM 5/8/70 § 303	
(b) -----	\$25
Notice No. 2 DCM 5/8/70 § 305	
(k) -----	15
Notice No. 3 DCM 5/8/70 § 305	
(l) -----	15
Notice No. 1 DCM 8/31/70 § 202	
(a) -----	1
Notice No. 2 DCM 8/31/70 § 305	
(l) -----	25
Notice No. 1 DCM 11/12/70 § 305	
(k) -----	25
Notice No. 2 DCM 11/12/70 § 306	
(b) -----	5
Notice No. 3 DCM 11/12/70 § 306	
(d) -----	5
Notice No. 4 DCM 11/12/70 § 307	
(b) -----	5
Notice No. 1 DCM 11/13/70 § 305	
(g) -----	25
Notice No. 3 DCM 11/13/70 § 317	
(l) -----	1
Notice No. 3 DCM 11/13/70 § 317	
(n) -----	5

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Notice No. 4 DCM 11/13/70 § 317	
(s) -----	5
Notice No. 1 MM 12/16/70 § 303	
(o) -----	5
Notice No. 2 MM 12/16/70 § 303	
(t) -----	5
<hr/>	
Total Assessments-----	\$167

For the reason hereinbefore found, the Bureau's Petition for Assessment of Civil Penalty should be dismissed insofar as it sought assessment of civil penalties for violation of section 316 (Notice No. 4 DCM 5/8/70) of the Act.

I find and conclude that Respondent's Mine No. 2 is, and was at all pertinent times, subject to the provisions of the Act and to the safety and health standards promulgated thereunder, and that this case arose

under section 109(a) (1) of the Act and was properly completed pursuant to the Act after compliance with all procedural requirements.

ORDER

WHEREFORE, it is ordered that:

(A) Respondent is assessed civil penalties totaling \$167 which it shall pay within 30 days from the date of this decision.

(B) The Bureau's Petition for Assessment of Civil Penalty is dismissed insofar as it sought assessment of civil penalties with respect to section 316 of the Act.

RICHARD C. STEFFEY,
Administrative Law Judge.

CURTIS D. PETERS

13 IBLA 4

Decided August 29, 1973

Appeal from decision (S 3830) of California State Office, Bureau of Land Management, rejecting application for Indian allotment for national forest land.

Affirmed as modified.

Act of June 25, 1910—Indian Allotments on Public Domain: Generally—Indian Allotments on Public Domain: Lands Subject to

Where the Secretary of Agriculture has made a determination pursuant to section 31 of the Act of June 25, 1910, 36 Stat. 863, 25 U.S.C. § 337 (1970), that lands within a national forest are more valuable for agricultural or grazing purposes than for the timber found thereon, the Secretary of the Interior is authorized, in his discretion, to accept an application for an Indian allotment thereon, and to cause the allotment to be made. Even where such a determination by the Secretary of Agriculture has been made, the Secretary of the Interior may reject the allotment on any rational basis, including, without limitation, considerations of public policy. Such considerations may encompass recreational and watershed values and avoidance of erosion.

APPEARANCES: William H. Cozad, Esq., of the California Indian Legal Services, Eureka, California, for appellant.

OPINION BY MR. FISHMAN
INTERIOR BOARD OF
LAND APPEALS

Curtis D. Peters has appealed from a decision of the California

State Office, Bureau of Land Management, dated November 17, 1972, which rejected his Indian allotment application embracing lands within the Klamath National Forest, California. This case is a sequel of *Curtis D. Peters*, 6 IBLA 5 (1972).

Appellant originally filed an application for an Indian allotment for lands within the Klamath National Forest on January 26, 1970. The application was rejected by the Bureau on the basis that neither appellant nor any of his ancestors occupied the land in accordance with 25 U.S.C. §§ 336, 337 (1970). The decision of the Bureau was reversed on appeal on the basis that there was no indication in the record that the Secretary of Agriculture had made a determination, in accordance with the Act of June 25, 1910, that the land in issue was more valuable for agricultural or grazing purposes than for the timber found thereon. *Curtis D. Peters, supra*.

The case was remanded to the Supervisor of the Klamath National Forest. On August 25, 1972, the Acting Regional Forester, acting on behalf of the Secretary of Agriculture, informed the Bureau of Land Management that a determination had been made in accordance with the decision in *Peters, supra*, that the land in issue was "more valuable for agricultural or grazing purposes than for the timber found thereon."

Notwithstanding the finding that the land was more valuable for agricultural or grazing purposes rather than for the timber found

thereon, the Acting Regional Forester concluded that the land in issue was more valuable for "national forest purposes," as set forth in the Organic Act of June 4, 1897, 30 Stat. 34, 16 U.S.C. § 475 (1970), and the Multiple-Use Sustained-Yield Act of June 12, 1960, 74 Stat. 215, 16 U.S.C. § 528 (1970), than for agricultural or grazing purposes.

The Bureau of Land Management, relying on the several determinations made by the Acting Regional Forester rejected appellant's application. Based upon our review of the record, we are of the opinion that appellant's application should not have been rejected on the basis of the determination made by the Forest Service that the land in issue was more valuable for "national forest purposes" than for agricultural or grazing purposes.

Section 31 of the Act of June 25, 1910, provides:

The Secretary of the Interior is authorized, in his discretion, to make allotments within the national forests in conformity with the general allotment laws, to any Indian occupying, living on, or having improvements on land included within any such national forest who is not entitled to an allotment on any existing Indian reservation, or for whose tribe no reservation has been provided, or whose reservation was not sufficient to afford an allotment to each member thereof. All applications for allotments under the provisions of this section shall be submitted to the Secretary of Agriculture who shall determine whether the lands applied for are more valuable for agricultural or grazing purposes than for the timber found thereon; and if it be found that the lands applied for are more valu-

able for agricultural or grazing purposes, then the Secretary of the Interior shall cause allotment to be made as herein provided. (Italics supplied.)

It is obvious from the language quoted in the Act of June 25, 1910, that the proper legal standard to be applied by the Secretary of Agriculture is whether the land applied for as an Indian allotment is more valuable for agricultural or grazing purposes or for the timber found thereon. Nowhere in the Act of June 25, 1910, is there any reference to a legal standard to be applied which relates to "national forest purposes." References to the Organic Act of June 4, 1897, and the Multiple-Use Sustained-Yield Act of June 12, 1960, are, in our view, inapposite for the determination by the Department of Agriculture. The term "forest purposes" is much broader in scope than the term "timber." Congress used the word "timber" in the Act of June 25, 1910, and refers to "forest purposes" in the Organic Act and the Multiple-Use Sustained-Yield Act. At the time that Congress enacted the 1910 Act, it was, of course, aware of the term "forest purposes" employed in the 1897 Act. Had Congress intended to utilize the same standard, it would have employed the same term. Moreover, the Multiple-Use Sustained-Yield Act of June 12, 1960, does not grant any substantive authority to the Department of Agriculture, but simply reiterates the then existing practices of the Forest Service as having Congressional policy approval. We can only conclude that by using different terms Congress

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intended the terms to have different meanings.

If the applicant has otherwise met the requirements for an Indian allotment, his application should not be denied on the basis of the Department of Agriculture's determination that the land is more valuable for national forest purposes than for agricultural or grazing purposes.¹ The Secretary of Agriculture, through his delegate, specifically made a determination that the land in issue is more valuable for agricultural or grazing purposes than for the timber found thereon. This is the standard which appears in the Act of June 25, 1910, and it is the only proper standard to be applied by the Department of Agriculture.

In *Peters, supra*, the question of appellant's occupancy of the land in issue was not reached. The case was remanded to the Supervisor of the Klamath National Forest to determine, as required by the Act of June 25, 1910, whether the land was more valuable for agricultural or grazing purposes or for the timber found thereon. Since the determination has been made that the land is more valuable for agricultural or grazing purposes, we now reach the issue of the exercise of this Department's discretion.

This Department is not required to grant an Indian allotment within a national forest merely because the statutory criteria have been satisfied. The 1910 Act is crystal clear that, "[t]he Secretary of the In-

terior is authorized, in his discretion" to make such a grant. The proper exercise of discretionary authority by this Department has received judicial sanction. See *Udall v. Tallman*, 380 U.S. 1 (1965), *rehearing denied*, 380 U.S. 989 (1965); *Duesing v. Udall*, 350 F.2d 748 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 912 (1966); *Pease v. Udall*, 332 F.2d 62 (9th Cir. 1964); *Thor-Westcliffe Development, Inc. v. Udall*, 314 F.2d 257 (D.C. Cir. 1963), *cert. denied*, 373 U.S. 951 (1963); *Haley v. Seaton*, 281 F.2d 620 (D.C. Cir. 1960).

Approval of an Indian allotment never was and is not now a mere ministerial duty of this Department. *Finch v. United States*, 387 F.2d 13 (10th Cir. 1967), *cert. denied*, 390 U.S. 1012 (1968). The exercise of discretionary authority must be predicated upon rational grounds. *United States v. Maher*, 5 IBLA 209, 79 I.D. 109 (1972). See *Hopkins v. United States*, 414 F.2d 464 (9th Cir. 1969); *Daniels v. United States*, 247 F. Supp. 193 (W.D. Okla. 1965).

The information of record indicates that the land could not support reasonably an Indian family. See *Hopkins v. United States, supra*. This conclusion stems from the finding that under optimum conditions the lands applied for could support 10 to 13 cows for one year and in the general area the smallest marginal family unit is considered to be 200 cows. Although it is true that Indian allotment applications for lands in national forests are not subject to the classi-

¹ See *Junior Walter Daugherty*, 7 IBLA 291 (1972).

fication authority of the Secretary of the Interior, *Bobby Lee Moore*, 72 I.D. 505, 513 (1965), the issue of the economic viability² of the allotment sought is a matter to be considered by the Department in exercising its discretion. *See John E. Balmer*, 71 I.D. 66 (1964).

In *Balmer*, at p. 67, the Department stated:

Since the intent of the Indian Allotment Act is to provide, in effect, a home-
stead which will constitute the source of
a livelihood for an Indian family * * *
it is within the authority of the Secretary of the Interior to determine that 160
acres of grazing land that is incapable
of supporting a ranch family is not proper
for acquisition in satisfaction of rights
acquired by Indians under the Indian
Allotment Act.³

We note that appellant's connection with the lands sought is, at best, tangential. The un rebutted facts of record show that appellant was born at Eyese Bar, California, May 24, 1924, and lived there until 1936. Eyese Bar is some 50 miles distant from the lands in issue. Appellant and his family lived on the lands

² We wish to stress that we are not suggesting that the land sought under the Indian allotment laws must constitute, in and of itself, an economic self-sustaining unit before it will be allotted. However, the Secretary of the Interior may consider the land's economic potential in the totality of the considerations bearing upon the exercise of his discretion.

³ It may be argued that a finding by the Secretary of Agriculture that the lands are more valuable for agricultural or grazing purposes than for timber is dispositive of the matter. However, 43 CFR 2533.2(b), relating to Indian allotment applications in national forests, requires that "the land * * * [be] found to be *chiefly* valuable for agriculture or grazing * * *." (*Italics added*). Lands which have the public use values enunciated in this decision are more valuable therefor than for the marginal grazing use such lands might support.

in issue from 1936 to 1944. Their residence was destroyed by fire in 1944 and has not been rebuilt. Appellant and his family moved away from these lands in 1944 and neither he nor they have lived on the lands since that time. It is doubtful that appellant is an Indian "occupying, living on, or having improvements" on the lands in issue. 25 U.S.C. § 337 (1970). Because of the disposition of this case, we need not decide⁴ the settlement issue.

In exercising discretion under the public land laws, the Department cannot be blind to considerations of public interest. *See Lillian Sherman*, A-28119 (January 15, 1960).

The report of the Acting Regional Forester of August 25, 1972, states in part that:

* * * [T]here are some oak and pine trees growing on the subject property, above the scenic Klamath River Highway, which add some recreational value because of scenic backdrop and aesthetics. Also, the eastern portion has potential recreational value as a small campground to accommodate fishermen, hunters and other recreationists. In addition, the subject property has value for watershed purposes. This is particularly true for the steep brush area. Any attempt to heavily graze it would cause the thin soil mantle to erode and wash into the Klamath River.

In view of the noneconomic agricultural or grazing potential of the lands, the remoteness of appellant's connection with such lands, and the

⁴ There are indications in the record that the lands may be mineral in character. Under 30 U.S.C. § 21 (1970), lands valuable for minerals are not subject to disposal under the land laws, with certain exceptions. In view of the disposition of the appeal, we refrain from addressing ourselves to this question.

public use and erosion potential of the lands if devoted to intensive grazing, the public interest is best served by affirmation of the rejection of the application at bar. This action represents the independent judgment of this Board. We reiterate that the sole function of the Department of Agriculture is prescribed by the law, *i.e.*, to determine whether the lands "are more valuable for agricultural or grazing purposes than for the timber found thereon." *See Miller v. United States*, Civil No. 70-2328 (N.D. Cal., July 5, 1973).

We point out that an Indian applicant is not deprived of his right to an allotment when his application is rejected. He is merely required to apply for other land suitable therefor. *Finch v. United States*, *supra*; *John E. Balmer*, *supra*.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

FREDERICK FISHMAN, *Member*.

WE CONCUR:

EDWARD W. STUEBING, *Member*.

DOUGLAS E. HENRIQUES, *Member*.

WHELESS DRILLING COMPANY

13 IBLA 21

Decided September 5, 1973

Appeal from decision GS-47-O&G whereby the Director, Geological Sur-

vey, affirmed an Oil and Gas Supervisor's order setting out a different basis for computation of the Government's royalty from oil and gas lease BLM 039498 (La.), and demanding payment of additional royalty thereon.

Affirmed.

Oil and Gas Leases: Royalties

In determining the amount of royalty due to the United States from production of natural gas from an oil and gas lease pursuant to sec. 3, Act of August 8, 1946, 60 Stat. 951, it is proper for the Geological Survey to use a base value which includes both the purchase price paid for the natural gas as established by the Federal Power Commission plus any additional sum paid by the purchaser of the gas to unit operator as consideration for the purchase of gas from the unit of which the federal lease is a part.

APPEARANCES: N. H. Wheless, Jr., President, Wheless Drilling Company; Lawrence R. Hoese, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C.

OPINION

BY MR. HENRIQUES

INTERIOR BOARD OF LAND APPEALS

Wheless Drilling Company has appealed from decision GS-47-O&G of November 8, 1971, wherein the Director, Geological Survey, affirmed the basis of royalty computation prescribed for oil and gas lease BLM 039498 (La.), Simsboro Field, Lincoln Parish, Louisiana, established by order of the Oil and Gas Supervisor, Tulsa, Oklahoma, dated July 20, 1970, as amended by order of July 31, 1970. The super-

visor required that payments of royalty to the Government be based on the gross proceeds accruing to the lessee, including both the sale price of the gas produced and the tax reimbursement made by the gas purchaser to the producer.

The issue presented is whether the amount reimbursed by the buyer to the seller of part of the severance tax paid by seller on production from a unit well is properly to be included as part of the gross value of the production in computation of the Government's royalty from a federal oil and gas lease committed to the communitization agreement under whose terms the well was drilled.

THE FACTS

Noncompetitive oil and gas lease BLM 039498 (La.) issued April 1, 1955, to J. B. Berland, for a term of five years and so long thereafter as oil or gas is produced in paying quantities. Section 3, Act of August 8, 1946, 60 Stat. 951. The lessee is obligated to pay to the lessor royalty at the rate of 12½ percent of the value of the production removed or sold from the leased lands, computed in accordance with the oil and gas operating regulations. 30 CFR 221.47, 221.50. By mesne conveyances, record title to the lease has become vested as follows:

Owner	Percentage
Wheless Drilling Company----	43.7500
Wheless Drilling Company, Trustee -----	12.5000
S. B. Hicks-----	8.7500
I. Lieber-----	2.1875

J. R. Querbes, Jr.-----	8.7500
George D. Nelson-----	2.1875
J. Pat Beaird-----	21.8750

The lease embraces the E ½ NW ¼ sec. 9, T. 17 N., R. 4 W., La. Mer., Lincoln Parish, Louisiana, containing 79 acres.

By its Order 222.1, dated August 28, 1957, the Louisiana Department of Conservation, inter alia, designated all sec. 9, T. 17 N., R. 4 W., La. Mer., as a 640-acre drilling and spacing unit within the Simsboro Field, pursuant to the Department's earlier Order 222.

Communitization Agreement 14-08-001-5303, approved January 19, 1959, by the Acting Director, Geological Survey, covers the 79 acres of federal land in lease BLM 039498 (La.), and the remaining 553 acres of privately owned land in sec. 9, T. 17 N., R. 4 W., effective as of June 1, 1958. The federal land comprises one-eighth of the unit area. Under the Agreement, all rights to the dry gas and condensate producible from the Hosston "L" zone of the Travis Peak formation in the said sec. 9 are communitized.

Wheless Drilling Company, operator of the unit, completed the #1 T. L. James well on private land in the NW ¼ SE ¼ sec. 9, on July 3, 1958, as a gas producer with initial production of 5½ million cubic feet of gas per day. All production from this well is allocable in accordance with Communitization Agreement 14-08-001-5303. Lease BLM 039498 (La.) became productive by virtue of being part of the unit.

September 5, 1973

Commencing August 14, 1958, gas produced from the #1 T. L. James well has been purchased by the Arkansas Louisiana Gas Company, a pipeline company operating in interstate commerce. Prices paid for the gas have been in accordance with field rates established by the Federal Power Commission [FPC], as follows:

\$0.11921 per thousand cubic feet of gas [Mcf] until October 1, 1961

\$0.12370 per Mcf until September 30, 1964

\$0.12820 per Mcf until September 30, 1967

\$0.13270 per Mcf since October 1, 1967

The State of Louisiana levies a severance tax upon all natural resources severed or produced from land or water, including natural gas, within the State. 47:631 La. Rev. Stat. of 1950, *as amended and supplemented*. The present impost, applicable since December 1, 1958, is 2.3 cents per Mcf, unless the producing well is incapable of producing an average of 250,000 cubic feet of gas per day, in which case the severance tax rate is reduced to $\frac{1}{3}$ cent per Mcf. 47:633 La. Rev. Stat. of 1950, *as amended and supplemented*. Payment of the tax is the responsibility of the owners of the resource at the time of severance, in proportion to the quantity of their respective interests. 47:632 La. Rev. Stat. of 1950, *as amended and supplemented*. The terms of lease BLM 039498 (La.), at sec. 2(k), provide that the lessee will pay all taxes lawfully assessed and levied under the laws of the State upon oil and

gas produced from the leased lands. The Government's royalty interest, however, is not charged with its pro rata share of the severance tax, as all other royalty owners are charged.

Pursuant to Article 9 of the gas sales agreement between Wheless Drilling Company, seller, and Arkansas Louisiana Gas Company, buyer, to which agreement production from lease BLM 039498 (La.) was committed July 1, 1958, the seller shall pay all existing severance taxes [the Louisiana severance tax on natural gas at that time was \$.003 per Mcf], but in the event that there is a later increase in the severance tax, the buyer will reimburse the seller for $\frac{2}{3}$ of such additional tax. The State of Louisiana, in fact, did increase its severance tax on natural gas to \$.023 per Mcf, effective December 1, 1958. Thereafter, Arkansas Louisiana Gas did reimburse Wheless for $\frac{2}{3}$ of the increase of 2 cents per Mcf, or \$.013333 per Mcf, on natural gas purchased from the #1 T. L. James well. It appears that Arkansas Louisiana Gas owns .1864175 interest in the #1 T. L. James well, so that actual reimbursement of severance tax paid to Wheless is for only .797958 interest, with no reimbursement being paid for the Government's royalty interest of .015625.

In practice, the buyer, Arkansas Louisiana Gas, does all the actual accounting work for the seller, that is, it computes the value of gas taken [at FPC-approved prices], the amount of Louisiana severance tax,

and the amount of reimbursement due under its gas sales agreement to repay part of the increased severance tax, and then makes payments as appropriate. As no severance tax is levied against the Government's royalty interest, no reimbursement is applied to it, so the royalty payment on the Government's share of royalty from inclusion of lease BLM 039498 (La.) in the #1 T. L. James well unit has been computed strictly on the basis of $\frac{1}{64}$ of the total FPC-set price per Mcf, based on the Government land being $\frac{1}{8}$ of the unit, and the Government royalty rate being $\frac{1}{8}$ of production.

In June 1970, when the Oil and Gas Supervisor became aware that Arkansas Louisiana Gas had been buying gas from the #1 T. L. James well for the contract price (the FPC-approved unit price per Mcf) [currently \$0.132700 per Mcf], plus the tax reimbursement of \$0.013333 per Mcf as provided in sec. 9 of the gas purchase contract, for an average weighted price of \$0.146033 per Mcf, he called upon Wheless by letter of July 20, 1970, for payment of additional royalty to the United States on the \$0.013333 per Mcf received for the interest of lease BLM 039498 (La.) since December 1, 1958.

Arkansas Louisiana Gas replied that no severance tax had been deducted from the Government's royalty interest, so no tax reimbursement had been paid thereon, and that the Government's royalty had always been computed as $\frac{1}{64}$ (.015625) of the value of the total

production from the #1 T. L. James well, based on the FPC-established contract price.

The Supervisor then, on July 31, 1970, modified his demand to call for payment of additional royalty to the Government based on a tax reimbursement of \$0.013125 ($\$0.013333 \times .984375$) per Mcf, in recognition of the fact that no tax reimbursement is paid for the .015625 tax-exempt interest of the Government.

The Director, Geological Survey, affirmed the Supervisor's demand, and this appeal followed.

The issue presented in this case is one of first impression for the Department. Wheless contends that since no severance tax is applicable to that portion of the production from the #1 T. L. James well attributable to the Federal royalty interest, the Government is not entitled to share in any proceeds which accrue to Wheless from the reimbursement of such taxes, which it has paid. Geological Survey maintains that, within the ambit of 30 CFR 221.47, "gross proceeds" for computation of the Federal royalty payment from its interest in the #1 T. L. James well includes the severance tax reimbursement.

Wheless contends that Federal lease BLM 039498 (La.), for computation of royalty attributable thereto, should be segregated from all other lands and interests included in Communitization Agreement 14-08-001-5303. Geological Survey argues that each tract of land within the communitized area

shares ratably in the proceeds from the sale of gas and condensate produced from the communitized formation.

Wheless contends the demand by Geological Survey for payment of additional royalty based on the reimbursement of severance tax will result in unjust enrichment in the value of the federal gas through a net loss to the gas producer.

The oil and gas operating regulations, in discussing the "Value basis for computing royalties" at 30 CFR 221.47, use the expressions "estimated reasonable value" and "gross proceeds" as parameters in establishing the "value of production" for the purpose of computing royalty. The regulations direct that consideration be given to the highest price paid for production of like quality in the same field, to the price received by the lessee, and to the posted price, as well as to other relevant matters.

We recognize that authority to set field prices for natural gas sold in interstate commerce is vested in the Federal Power Commission, by the Natural Gas Act, 15 U.S.C. §§ 717 *et seq.* (1970). We recognize also that the field price established by FPC is not necessarily the "value of production" as that term is used in the oil and gas operating regulations, 30 CFR 221.47, especially when the additional factor of "gross proceeds" is considered.

Proceeds and fair market value may not be interchangeable. Proceeds of a sale, unless there is something in the context showing to the

contrary, means total proceeds. *United States v. Stanolind Crude Oil Purchasing Company*, 113 F.2d 194, 198 (10th Cir. 1940).

The gas purchase contract involving the subject lease, entered into between Arkansas Louisiana Gas, the buyer, and Wheless, the seller, contains a provision in sec. 9 whereby the buyer will reimburse to the seller a specified percentage of any increase in the state severance tax above that in effect on the date of the agreement. The record shows that an increase in the state severance tax was imposed after the date of the contract, effective December 1, 1958, and that the buyer has reimbursed the seller the amounts specified in the sale agreement since that date.

It seems obvious to us that the buyer thus is paying to the seller an amount greater than the established field price for the natural gas it purchases from the #1 T. L. James well. It follows, therefore, that it is reasonable to compute the Federal royalty of the natural gas taken from this well on a unit value consisting of the field price established by FPC plus the amount of the severance tax reimbursed by the buyer. Within the context of 30 CFR 221.47, "gross proceeds" means the established field price for the natural gas plus any additional sums paid by the purchaser of the gas to the unit operator as consideration for the purchase of gas from the unit of which the federal lease is a part. In the present case, the unit value for purposes of com-

puting the Federal royalty is \$0.132700 plus 63/64 of \$0.013333 [\$0.013125] or a total of \$0.145825 per Mcf. Wheless must comply with the demand by the Oil and Gas Supervisor for payment of additional royalty to the United States on the reimbursed severance tax by the buyer.

California Company v. Udall, 296 F.2d 384 (D.C. Cir. 1961), affirms the right of the Secretary of the Interior to establish "reasonable price" for royalty purposes. *Kerr-McGee Oil Industries, Inc.*, 70 I.D. 464 (1963), held that the Secretary of the Interior in computing the basic royalty due to the United States under a lease may properly look to the actual consideration to be received by its lessee-seller under gas sales contracts with a buyer in order to determine the proper value basis for the royalty, and a determination by the Geological Survey that a reimbursement to the seller constitutes part of the contract sales price and should be included in the total value basis for the basic royalty computation is proper. We have applied these principles to the case at bar.

For the reasons set forth above we reject the contentions by Wheless that the federal royalties should be computed solely on the basis of the sale price of $\frac{1}{8}$ of the gas produced from the #1 T. L. James well, the government-owned land being $\frac{1}{8}$ of the communitized area. Absent any payments for reimbursement of severance tax or any other supplemental consideration, the FPC fig-

ure would probably be a proper base for computation of the royalty.

Likewise, we do not assent to the proposition that the computation of federal royalty on the gross proceeds, consisting of the gas purchase price plus the reimbursed severance tax, creates unjust enrichment of the Government's royalty interest. The Government is entitled to its royalty on the "reasonable value" of the gas as set by the Secretary, which by regulation may not be less than the highest gross price received for similar gas. We have determined that the base value for computation of the federal royalty in this case must include both the gas purchase price and the reimbursed severance tax.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

DOUGLAS E. HENRIQUES, *Member*.

WE CONCUR:

MARTIN RITVO, *Member*.

EDWARD W. STUEBING, *Member*.

**IN THE MATTER OF RANGER
FUEL CORPORATION (MINE A,
MINE B, AND MINE D)**

2 IBMA 186

Decided September 5, 1973

**Certification of Interlocutory Ruling.
Federal Coal Mine Health and Safety
Act of 1969: Hearings: Procedure**

Upon service on the operator of a petition for assessment of a civil penalty founded upon a request for hearing, the

(MINE A, MINE B, AND MINE D.)

September 5, 1973

jurisdiction of the Office of Hearings and Appeals (OHA) vests and the request for hearing, not being a pleading, cannot be withdrawn.

*MEMORANDUM OPINION
AND ORDER UPON
RECONSIDERATION*

*INTERIOR BOARD OF MINE
OPERATIONS APPEALS*

On July 17, 1973, the Board of Mine Operations Appeals issued a Memorandum Opinion and Order, 2 IBMA 163, CCH Employment Safety & Health Guide par. 16,287, accepting certification and reversing an interlocutory ruling by Administrative Law Judge (Judge) Paul Merlin, dated June 14, 1973, which denied Ranger Fuel Corporation's (Ranger) motion to withdraw its request for hearing, dated April 24, 1973, in the above-listed proceedings. The Board reversed the order and granted the motion, holding that the right of Ranger to withdraw was unaffected by the amendment of 43 CFR 4.512 on May 30, 1973. Subsequently, the Mining Enforcement and Safety Administration (MESA)¹ petitioned the Board to reconsider its decision. Having concluded that further exploration of the issues here involved was warranted, the Board stayed the outstanding orders, called for fresh briefs, and set the case down for oral argument on

August 20, 1973. Upon renewed examination of all the aspects of this case, it is the decision of the Board that the Memorandum Opinion and Order of July 17, 1973, be set aside and that the certified interlocutory ruling be affirmed.

Procedural Background

This case was filed under the procedures announced by the Department which became effective January 16, 1971. 30 CFR 100.4, 36 F.R. 780. On July 15, 1971, in conformity with the existing procedure, the Secretary's Assessment Officer in the Bureau of Mines (Bureau) proposed a civil penalty in the amount of four thousand two hundred dollars (\$4,200) for seven alleged violations. On August 2, 1971, Ranger filed a timely protest and a demand for hearing with the Assessment Officer. The protest was rejected on August 11, 1971, and, on August 24, 1971, Ranger reiterated its desire for public hearing. Ten days later, by letter dated September 3, 1971, the Assessment Officer notified Ranger that the matter had been forwarded to the Department's Associate Solicitor for institution of formal adjudication and stated:

You may at any time prior to hearing waive your right to a formal adjudication by notifying the Office of Hearings and Appeals of your desire to accept the Proposed Order of Assessment as final.

On March 8, 1972, the Bureau filed a Petition for the Assessment of Civil Penalty and served it upon Ranger by certified mail. Respond-

¹The moving party in this case was the Bureau of Mines. Effective July 16, 1973, the MESA was substituted for the Bureau in this proceeding. See 38 F.R. 18695 (1973).

ent answered on March 23, 1972. A year later, on March 27, 1973, the case was referred to Administrative Law Judge Merlin² who set the case for hearing on May 1, 1973.

During the interim between the Respondent's Answer and the assignment of Judge Merlin, the informal assessment procedures of 30 CFR Part 100 were challenged in the United States District Court for the District of Columbia in *National Independent Coal Operators' Association v. Morton* (NICOA), CCH Employment Safety & Health Guide par. 15,504.³ In that case, the court held invalid a proposed order of assessment which had become final by operation of law, 30 CFR 100.4(e), there having been no timely protest and request for hearing by the operator. The court, in its opinion of March 9, 1973, concluded that the order failed to comply with section 109(a)(3) of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 742-806, 30 U.S.C. §§ 801-960 (1969), which requires case-by-case findings of fact and which cannot be satisfied by a form where the Assessment Officer merely fills in the Respondent's name, the violations, and the assessments proposed. On March 15, 1973, the court issued an order declaring the procedures for assessment unlawful and enjoining their

utilization until modifications in accord with the opinion of March 9 were made. By order of the same date, the court stayed its injunction for thirty days. No. 397-72.

In his opinion, District Judge Robinson expressly limited his holding. He stated that the Secretary was not precluded from using informal assessment procedures provided the fatal lack of genuine findings of fact was remedied. On April 24, 1973, the Department suspended part 100 of 30 CFR, pending appeal, and modified existing procedures untouched by Judge Robinson's injunction. 43 CFR 4.540 *et seq.*, 38 F.R. 10086-7. In part, the new regulations provided for informal assessment under a new formula and the institution of formal adjudication in every case.

Coincidentally, on that same date, Judge Merlin received a telegram from Ranger which he construed to be a motion to withdraw its request for hearing. Judge Merlin denied the motion on June 14, 1973, relying on 43 CFR 4.512, 38 F.R. 14170, *as amended*, effective May 30, 1973, which reads as follows:

(a) Except as provided in paragraph (b) of this section, a party may withdraw a pleading at any stage of a proceeding without prejudice.

(b) A petition for civil penalty assessment filed by the Bureau under section 109(a) of the act may be withdrawn only upon motion of the Bureau or in the case of an operator-filed petition for hearing and formal adjudication with the Bureau's concurrence.

The Judge then certified his ruling to the Board for interlocutory determination.

² The change of title of the hearing officer from "Hearing Examiner" was effectuated pursuant to the order of the Civil Service Commission. 37 F.R. 16787 (1972).

³ This decision has been followed in *Morton v. G. M. W. Coal Co., Inc.*, CCH Employment Safety & Health Guide par. 16,253 (W.D. Pa. 1973).

(MINE A, MINE B, AND MINE D.)

September 5, 1973

Discussion

Prior to the *NICOA* case, there was virtually no dispute over operator requests to withdraw from formal adjudication because the policy of granting withdrawal suited the interests of everyone involved. The operator could request formal adjudication, within the short fifteen working day period allowable under the regulations, confident in the knowledge that it had preserved its due process rights and could now decide, without time pressure, whether to accept the amount of the proposed assessment; to litigate administratively, or to defend a section 109 enforcement suit in federal court. The Bureau and the Administrative Law Judges in the Office of Hearings and Appeals were satisfied because the policy decreased the crowded hearings docket and facilitated expeditious and inexpensive final administrative determinations or an acceptance of the proposed assessment.⁴

In the aftermath of the *NICOA* decision, the situation changed radically. Formerly, withdrawal or dismissal, in the absence of settlement, resulted in the finalization of the proposed order of assessment by operation of law. After *NICOA*, it was clear that such a conclusion was legally precluded and that withdrawal could have the effect of vitiating some Bureau enforcement ef-

forts or of imposing the administrative burden of reassessment under a new procedure.

The Administrative Law Judges reacted to the changed legal framework and the development of dispute in varying ways. One Judge who dealt with the problem of withdrawals of requests for hearing by operators concluded that the regulation, 43 CFR 4.512, upon which the Judges had relied in order to permit withdrawals, was not mandatory, but rather conferred discretion upon the Judges to permit dismissals. He assumed that the unilateral act of filing a withdrawal motion did not result in an immediate loss of jurisdiction. After weighing the undesirable results to be anticipated from withdrawal, the Judge denied the motion. *See* decision of Administrative Law Judge George A. Koutras in *Snap Creek Coal Company*, Docket No. HOPE 72-301-P (May 24, 1973). Subsequent to May 30, 1973, some Judges, like Judge Merlin in the case at hand, denied withdrawal on the theory that 43 CFR 4.512, *as amended*, required Bureau concurrence as a condition precedent to withdrawal. *See* decision of Administrative Law Judge Edmund M. Sweeney in *Perry County Coal Corporation*, Docket No. BARB 72-160-P (June 20, 1973).

The Board has not had the occasion prior to the instant case to deal squarely with a withdrawal of a request for hearing or to construe 43 CFR 4.512. Ranger has argued

⁴ The portion of the Assessment Officer's letter of September 3, 1971 explaining the operator's option to waive the right to formal adjudication prior to hearing is evidence of this policy.

the relevance of our decisions in *Trace Fork Coal Company*, 1 IBMA 68, CCH Employment Safety & Health Guide par. 15,369 (1971) and *Jewel Ridge Coal Corporation*, 1 IBMA 170, CCH Employment Safety & Health, Guide par. 15,379 (1972), but we do not find them to be especially helpful. In *Trace Fork*, we reversed a ruling denying the Bureau the right to withdraw its petition for assessment of civil penalty on the theory that, in the absence of an applicable statute or regulation, the party initiating a proceeding may withdraw its petition. In *Jewel Ridge*, we concluded that an Administrative Law Judge did not abuse his discretion by dismissing a Bureau petition for assessment after a six-month period during which the operator failed to file a required answer. However, neither case dealt with an operator's attempt to withdraw its request for hearing and each contained a narrow holding possessing no dispositive authority with respect to the case at hand.

Ranger has also relied on the original version of 43 CFR 4.512, in effect on April 24, 1973 when withdrawal was sought, claiming that the request for hearing filed with the Assessment Officer is a pleading. MESA has countered Ranger's argument by insisting that Judge Merlin acted properly by applying the amended version of 4.512 which became effective May 30, 1973 on the theory that the case at hand was pending. We do not feel, however, that 43 CFR 4.512, in its original or amended version, is rele-

vant to the soundness of the certified ruling. We have reached this conclusion because, in our judgment, a request for hearing is not a pleading by any conventional definition of that term. Pleadings are formal allegations by a party of the facts constituting claims and/or defenses which are filed with the fact-finding tribunal competent to conduct a hearing and duly served on the opposing party or parties. A request for hearing filed with the Assessment Officer cannot properly be described as a pleading because it contains no allegations of fact and is not filed with the Hearings Division of the Office of Hearings and Appeals (OHA).

This is not to say, however, that Judge Merlin erred in his ruling denying withdrawal of the request for hearing. Rather we must look elsewhere to determine his authority in this matter.

We start with the proposition that, under the regulations governing this case, a request for hearing was jurisdictional. The request was an essential condition precedent to the filing of the petition for assessment of a civil penalty with OHA by the Bureau. In the absence of such a request, the Administrative Law Judge would have been obliged to dismiss for want of jurisdiction either pursuant to motion or *sua sponte*. Upon service on the operator of a petition for assessment founded upon a request for hearing, the jurisdiction of OHA vested and the request for hearing was in effect executed and could not be

withdrawn. Thereafter, any dismissal of the hearing at the initiative of the operator was discretionary with the Administrative Law Judge.

Ranger has advised us that the motivation which prompted the motion to withdraw the request for hearing was an objection to being in formal adjudication as a result of refusing to accept an assessment figure arrived at in an unlawful manner. MESA informed us during oral argument that, as a matter of policy, it has been issuing reassessment figures upon request. MESA appears willing to apply its stated policy in the present case, but urges us not to require a dismissal on the ground that we would be setting a precedent which would result in the imposition of a staggering administrative burden involving reinstitution of a large number of cases in varying stages which would only produce delay and could not otherwise advance any legitimate interest of an operator.

We feel that there is some merit in the respective positions of Ranger and MESA and that, pursuant to proper motion, an operator may be accorded its right to a figure assessed under the newly mandated formula without the result that MESA fears. Administrative Law Judges possess the discretion to grant a motion to dismiss without prejudice or a motion to continue the hearing for a reasonable period

to permit MESA to present a reassessed figure to the operator who can in turn seek to compromise or to press on with formal adjudication. In deciding whether or not to grant dismissal, if it is sought, a Judge should take into consideration the extent of the administrative burden involved in requiring MESA to go through a fresh adjudicatory proceeding in the circumstances.

In any event, Ranger's motion to withdraw its request for hearing after jurisdiction vested is not a method whereby the operator could obtain a new informal assessment. Accordingly, we conclude that the motion was properly denied.

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the Board's Memorandum Opinion and Order of July 17, 1973, and the order of dismissal of Administrative Law Judge Paul Merlin, dated July 19, 1973, be set aside.

IT IS FURTHER ORDERED that the certification of the ruling in the above-entitled case IS ACCEPTED, and the ruling IS AFFIRMED.

C. E. ROGERS, JR., *Chairman.*

DAVID DOANE, *Member.*

HOWARD SCHELLENBERG, JR.,
Alternate Member.

FREEMAN COAL MINING CORPORATION

2 IBMA 197

Decided September 12, 1973

Appeal by the Mining Enforcement and Safety Administration (MESA) from an Order of an Administrative Law Judge vacating an "imminent danger" order of withdrawal and converting it to a section 104(b) notice of violation in Docket No. VINC 72-59.

Reversed.

Federal Coal Mine Health and Safety Act of 1969: Administrative Procedure: Hearings: Order of Proof

Section 556(c)(5) of the Administrative Procedure Act grants wide latitude to Administrative Law Judges to regulate the course of the hearing including the order of proof. In the absence of clear abuse, the ruling of an Administrative Law Judge assigning the initial burden of going forward will not be overturned.

Federal Coal Mine Health and Safety Act of 1969: Hearings: Burden of Proof

In a proceeding to review an imminent danger order of withdrawal, the operator, as the applicant, bears the burden of proof, under 43 CFR 4.587, with respect to both the threshold issue of no danger and the issue of no imminence. If the operator bears the burden of proving either issue by a preponderance of the evidence, it prevails.

Federal Coal Mine Health and Safety Act of 1969: Hearings: Burden of Proof

Whether a condition or practice constitutes a violation of a mandatory health or safety standard is not an issue in a proceeding to review an imminent dan-

ger withdrawal order and MESA has no burden, under 43 CFR 4.587, of proving whether the danger involved is a violation.

Federal Coal Mine Health and Safety Act of 1969: Hearings: Powers of the Administrative Law Judges

An Administrative Law Judge has no authority to convert an imminent danger order of withdrawal to a notice of violation.

Federal Coal Mine Health and Safety Act of 1969: Imminent Danger

An "imminent danger" exists where the cited condition or practice would warrant the conclusion by a reasonable man that, at the time of issuance, a proximate peril to life or limb existed and that, if normal operations to extract coal continued, a serious accident or disaster would be likely to occur before abatement.

Federal Coal Mine Health and Safety Act of 1969: Imminent Danger: Proximate Peril

A proximate peril to life or limb exists where a reasonable man would conclude that the facts indicate an impending accident or disaster, threatening to kill or to cause serious physical harm, likely to occur at any moment, but not necessarily immediately.

Federal Coal Mine Health and Safety Act of 1969: Imminent Danger

Where an inspector observes accumulations of float coal dust throughout an area approximately 7200 feet in length in a coal mine with a history of unpredictable releases of methane and at least one prior dust explosion, he is warranted in issuing an imminent danger withdrawal order.

APPEARANCES: Robert W. Long, Associate Solicitor, J. Philip Smith, Assistant Solicitor, John H. O'Donnell, Trial Attorney, for appellant, Mining

September 12, 1973

Enforcement and Safety Administration; Harry M. Coven, for appellee, Freeman Coal Mining Corporation.

*OPINION BY MR. DOANE
INTERIOR BOARD OF MINE
OPERATIONS APPEALS*

The Mining Enforcement and Safety Administration (MESA)¹ appeals to the Board to reverse a decision vacating and converting an "imminent danger" order of withdrawal issued pursuant to section 104(a) of the Federal Coal Mine Health and Safety Act (hereinafter the Act), to a section 104(b) notice of violation.² After a careful study of the record, the briefs, and the Administrative Law Judge's opinion, we conclude that there were significant errors warranting reversal for the reasons set forth in detail below.

I.

*Factual and Procedural
Background*

This case commenced on March 14, 1972, when MESA Inspector James A. Rennie inspected Orient No. 5 Mine which is operated by the Freeman Coal Mining Corporation (hereinafter Freeman). He issued "imminent danger" order of with-

drawal No. 1 JAR citing the following conditions:

The main belt from the dump on the bottom of the tallpiece at 1,004 ft. tag north and the main east belt from No. 1 drive to the 7 north a distance of 4,596 ft. tag, and the 7 north belt was very black with float coal dust.³

In response to the order, operations to extract coal ceased and the eighty men who were working at that time turned their efforts to rock-dusting in order to abate the cited condition. Twenty-six and a half hours later, the inspector terminated the order.

Subsequently, Freeman filed an Application for Review pursuant to section 105(a) of the Act and a hearing on the merits was held August 1 and 2, 1972. At the hearing, Federal Coal Mine Inspectors Rennie and Michael McDermott testified on behalf of MESA. Freeman called as witnesses Clifford Frye, superintendent of the mine, and Franklin J. Padavic, a mining and production engineer who was employed as an assistant to Freeman's vice president of operations. By decision on October 19, 1972, the Administrative Law Judge vacated the order, which had been predicated on facts constituting a violation of section 304(a),⁴ and con-

¹ The moving party in this case originally was the Bureau of Mines. The mine health and safety, assessment, and compliance functions of the Bureau were transferred to the newly established Mining Enforcement and Safety Administration, effective July 18, 1973. MESA has, therefore, been substituted for the Bureau in this proceeding. See 38 F.R. 18695 (1973).

² P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1969).

³ A "tag" is a marking by a surveyor which designates the number of feet from a reference point. The "tags" in this case were pieces of manila paper attached to a mark on the roof. (Tr. 5.)

⁴ Section 304(a) provides as follows: "Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein."

verted it into a section 104(b) notice of violation citing a failure to comply with the safety standard set out in section 304(d)⁵ of the Act. The order as written did not specifically identify section 304(a), but, from the record, it is clear that both parties and the Administrative Law Judge understood that it was the violation of this section which constituted the alleged imminent danger that resulted in the withdrawal order. (Tr. 51.)

II

Issues on Appeal

A. Whether the Administrative Law Judge erred in placing the burden of going forward and the burden of proving a violation of section 304(a) upon MESA.

B. Whether an Administrative Law Judge has the authority to convert an imminent danger order of withdrawal to a notice of violation.

C. Whether the Administrative Law Judge erred in concluding that the operator, Freeman, successfully proved by a preponderance of the evidence that the cited condition was not imminently dangerous.

⁵ Section 304(d) provides in relevant part as follows: "Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall not be less than 65 per centum * * *."

III.

Discussion

A.

The Administrative Law Judge required MESA to go forward with its evidence first. (Tr. 10.) He also placed the burden of proving a violation of section 304(a) of the Act upon MESA, while requiring Freeman to prove the lack of imminence in the danger. (Tr. 15, 267.) MESA challenges both the assignment of the initial burden of going forward and the burden of proof with respect to the violation contending that the Judge misapprehended and misapplied our decision in *Lucas Coal Company*,¹ 1 IBMA 138, 79 I.D. 425 (1972), CCH Employment Safety and Health Guide par. 15,378 (1973).

In *Lucas*, we held that, where the danger cited in a withdrawal order allegedly constitutes a violation, the burden of proof with respect to the lack of imminence in the danger is always upon the operator in a review proceeding. We had no occasion to discuss what discretion, if any, an Administrative Law Judge possesses over the order of proof. Nor did we decide whether MESA bears the burden of proving a violation in a proceeding to review a withdrawal order where the condition or practice cited is based upon a violation. Consequently, *Lucas* is not determinative of the issue now under discussion.

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A more relevant authority in the matter of the Administrative Law Judge's power in assigning the burden of going forward is section 7 of the Administrative Procedure Act⁶ which provides in relevant part:

Subject to published rules of the agency and within its powers, employees presiding at hearings may * * * regulate the course of the hearing; * * *

This section grants wide latitude and substantial discretion to Administrative Law Judges to determine the manner in which a hearing proceeds.⁷ See also *Cella v. United States*, 208 F.2d 783 (7th Cir. 1953), cert. denied, 347 U.S. 1016 (1954), *Fairbank v. Hardin*, 429 F.2d 264 (9th Cir.), cert. denied, 400 U.S. 943 (1970). We are of the opinion that this discretion includes the power to determine the order of proof, and, in the absence of clear abuse, an Administrative Law Judge's placement of the burden of going forward will not be overturned. We perceive no such abuse in this case.

Contrary to the position taken by MESA both at the hearing and in its brief on appeal, there is no requirement that the applicant establish a prima facie case before MESA may be required to present its proof. Moreover, there is no persuasive basis in law or precedent cited to us or disclosed by our research to support MESA's additional argument that the burden of

going forward is necessarily linked to the burden of proof and that both must be borne by the same party. We conclude, therefore, that there was no error in the Administrative Law Judge's ruling on the order of proof.

By contrast, the authority which governs the burden of proof is not set out in a statute, but rather in a specific regulation, namely, 43 CFR 4.587, promulgated under the Act. That section provides in relevant part as follows:

In proceedings brought under the Act, the applicant * * * shall have the burden of proving his case by a preponderance of the evidence provided that * * * (b) wherever the violation of a mandatory health and [or] safety standard is an issue the Bureau shall have the burden of proving the violation by a preponderance of the evidence. [sic.]

MESA contends in substance that the proviso quoted above has no application to review proceedings under section 104(a) of the Act which authorizes a withdrawal order upon a finding of imminent danger. After a close analysis of the Act and the regulation quoted above, we are of the view that MESA is correct.

Section 3(j) of the Act defines imminent danger to be "the existence of any condition or practice in a coal mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." The pertinent words in that phrase are "condition or practice." In reading sections 3(j) and 104(a) together and then comparing the two with

⁶ 5 U.S.C. § 556(c)(5).

⁷ The applicable regulation is 43 CFR 4.582 (a)(5) which does not modify section 556.

the other subsections of section 104, which contain the term "violation," we are convinced that the lack of parallelism was a conscious act rather than the result of an inadvertent slip of the draftsman's pen. In fashioning section 3(j), we think that the Congress deliberately chose terminology broader than the word "violation" because it was vitally aware of the uniquely hazardous nature of mining and of the necessity for granting the inspector wide discretion to assess imminent danger unfettered by the irrelevant question of whether the cited condition or practice fits the technical definition of a codified violation. It is conceivable that a cited condition or practice may fail to fit all the requirements of a violation but still be an imminent danger. Likewise, we can easily envision a lawful imminent danger withdrawal order which is based upon a combination of conditions or practices no one of which is individually a violation. In employing this more inclusive terminology, Congress sought to reach any conditions or practices, whether or not codified, which constituted an imminent danger to life and limb. To put the matter another way: whether a condition or practice constitutes a violation was not intended to be and is not a controlling issue in a proceeding to review an imminent danger withdrawal order. The Administrative Law Judge, therefore, erred in requiring the Bureau to preponderate upon an irrelevancy.

We draw additional support for this conclusion from the inconsis-

ent and unfair consequences which would result from affirming the ruling. If the condition or practice cited in the withdrawal order was not based upon a violation, the proviso in 43 CFR 4.587 would not apply and the burden of proof would be on the operator rather than on MESA. We think that the variability in the burden would be totally arbitrary and without justification in policy and, therefore, we decline to accept such an interpretation of the regulation.

We emphasize that, in a proceeding to review a section 104(a) withdrawal order, the operator bears the burden of proof with respect to both the threshold issue of no danger and the issue of no imminence. As a minimum, the operator need only prove no danger by a preponderance of the evidence in order to prevail. If the Administrative Law Judge concludes that the cited condition or practice was not a danger or that the danger was not imminent, the withdrawal order must be vacated.

B.

We are disturbed by the Administrative Law Judge's decision to convert the withdrawal order in issue to a notice of violation, an action which we think exceeded his lawfully delegated powers. The power to issue a withdrawal order or a notice of violation is vested by the Act in the "authorized representative" of the Secretary. It is clear from the Act itself and the legislative history that neither an Administrative Law Judge nor

this Board is an "authorized representative," as that term is used in the Act. Section 103 sets forth the responsibilities and powers of the "authorized representatives" and deals exclusively with inspections and investigations. Elsewhere, in section 505, headed: "Inspectors; Qualifications; Training," the qualifications of "authorized representatives" are detailed. These qualifications concern practical mining experience or engineering education which are hardly part and parcel of the background of the Administrative Law Judges. Moreover, in the legislative history, there is a statement setting forth the agreed position of the House and Senate conferees on the Act. In the discussion of the term "delegate," defined in section 3(a), the statement reads:⁸

* * * The delegate would, of course, be a person designated by him [the Secretary] to administer and enforce this act and *would include the Federal inspectors who are referred to throughout the act as the Secretary's authorized representatives.* (Italics added.)

It is evident to us that the term "authorized representative" does not include Administrative Law Judges.

In addition to the statutory circumscription of the power of Administrative Law Judges, there is a specific regulation governing their powers.⁹ We find nothing in

this regulation which would authorize Judges to charge operators with a violation or to choose between statutory sanctions. This regulation reflects the pattern in the statute which deliberately differentiated prosecutorial functions from those which are purely of a review or adjudicative nature.

We, therefore, conclude that an Administrative Law Judge has no authority to convert a withdrawal order to a notice of violation. The conversion which occurred in the instant case was error.

C.

In determining the validity of the withdrawal order in the first instance, the Administrative Law Judge was limited either to upholding it or vacating it. The ultimate question before him was whether Freeman successfully proved by a preponderance of the evidence that the cited condition was not imminently dangerous. We hold that Freeman did not.

The Administrative Law Judge found that the aggregate length of the beltways cited in the order amounted to approximately 7200 feet and that there was float coal dust throughout the area, the general color being black. He also found that there was no methane gas present, no inadequacy of ventilation, no violation of permissible equipment, and no dust in suspension. He concluded that the constituent elements of an explosion were not present, and held, as a matter of law, that "Freeman met whatever burden it

⁸ House Comm. on Ed. and Labor, *Legislative History Federal Coal Mine Health and Safety Act*, Comm. Print, 91st Congress, 2d Sess., pp. 1025-26.

⁹ 43 CFR 4.582.

had of proving that a finding of imminent danger was not warranted." Dec. 8.

We are of the opinion that the findings of fact are inadequate. The fatal defects are omissions of significant, unchallenged, and apparently credible evidence from the hearing. We find as additional facts the following: first, float coal dust is highly flammable and is so lightweight that it can be easily disturbed and suspended in air (Tr. 34); second, the mine had previously been classified as gassy (Tr. 29); third, between March 8 and March 20, there were two incidents where significant amounts of methane were detected (Tr. 169); fourth, at the time the withdrawal order was issued, the mine was in operation (Tr. 115); finally, in 1963 or 1964, there had been a dust explosion in this mine (Tr. 86).

It bears repeating that the statutory definition of the term "imminent danger" is "the existence of any condition or practice in a coal mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." The word "reasonably" necessarily means that the test of imminence is objective and that the inspector's subjective opinion need not be taken at face value. It also suggests that each case must be decided on its own peculiar facts. The question in every case is essentially the proximity of the peril to life and limb. Put another way: would a reasonable man, given a qualified inspector's

education and experience, conclude that the facts indicate an impending accident or disaster, threatening to kill or to cause serious physical harm, likely to occur at any moment, but not necessarily immediately? The uncertainty must be of a nature that would induce a reasonable man to estimate that, if normal operations designed to extract coal in the disputed area proceeded, it is at least just as probable as not that the feared accident or disaster would occur before elimination of the danger. See *Eastern Associated Coal Corp.*, 2 IBMA 128, 80 I.D. 400, CCH Employment Safety and Health Guide par. 16,187 (1973).¹⁰

Turning to the reconstructed findings of fact, we note, first, that the float coal dust layer spanned a very large area. The ease with which that dust could have been suspended leads us to discount the fact that it was only lying on the surface at the time the withdrawal order was issued. If normal operations to extract coal proceeded while abatement was attempted, it is probable that the dust would be disturbed. Moreover, the length of 7200 feet is important because it substantially multiplies the chances for disturbing the dust and increases the number of miners exposed to the threat of death or injury by a propagated explosion.

Second, the insignificance of the amount of methane which was probably in the air at the time that the

¹⁰ This case has been appealed to the United States Court of Appeals for the Fourth Circuit where it is pending. No. 73-1859 (July 13, 1973).

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withdrawal order was issued on March 14, 1972¹¹ is a fact which must be weighed against the history of the mine and its inherently gassy quality. The two recorded incidents of excessive concentrations of methane between March 8 and 20, 1972, plus the uncontradicted testimony of Inspector Rennie that a prior dust explosion had occurred in 1963 or 1964 undermine the certainty of the Administrative Law Judge that there was no imminent danger. Furthermore, the previous classification of Orient No. 5 Mine as gassy strongly suggests that it is probable that, if operations to extract coal proceeded, a pocket of methane might inadvertently and unavoidably be tapped. Parenthetically, we might add that the United States Court of Appeals for the Fourth Circuit has affirmed a Board holding that Congress abolished the distinction between gassy and non-gassy mines because all coal mines are potentially gassy and because extraction operations can and do release methane on a wholly unpredictable basis.¹²

We are of the view, therefore, that the condition cited in the order would warrant the conclusion by a reasonable man that, at the time of issuance, a proximate peril to life and limb existed and that, if normal

operations to extract coal continued, an explosion might occur before abatement. We hold that the Administrative Law Judge erred in deciding that Freeman proved by a preponderance of the evidence that there was no imminent danger.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision issued February 7, 1973, is REVERSED.

DAVID DOANE, *Member.*

I CONCUR:

C. E. ROGERS, JR., *Chairman.*

ESTATE OF HIEMSTENNIE (MAGGIE) WHIZ ABBOTT

2 IBIA 53

Decided September 13, 1973

Appeal from the Judge's decision denying the validity of Last Will and Testament leaving decedent's entire estate to her niece, Ramona Whiz Smith, as sole devisee.

Reversed and remanded.

105.1 Indian Probate: Administrative Procedure: Applicability to Indian Probate

The requirement of the Administrative Procedure Act, that all decisions of a Judge shall include a statement of findings and conclusions, and the reasons or basis therefor, on all material issues of

¹¹ Whenever the amount of methane gas detected was less than one percent, it was recorded as zero. (Tr. 146.)

¹² *Reliable Coal Corporation*, 1 IBMA 50, 78 I.D. 199, CCH Employment Safety and Health Guide par. 15,368 (1971), *aff'd. sub. nom. Reliable Coal Corporation v. Morton*, No. 72-1477, CCH Employment Safety and Health Guide par. 15,696 (4th Cir. 1973).

fact, law, or discretion presented on the record is mandatory and applicable to all decisions of Judges in Indian Probate proceedings.

105.2 Indian Probate: Administrative Procedure: Official Notice, Record

Official notice of documents and records will not be taken unless they are introduced in evidence or unless an order or stipulation provides to the contrary.

370.0 Indian Probate: Rehearing: Generally

A rehearing will be granted where the original hearing did not conform with the standards of a full opportunity to be heard embodied in the Administrative Procedure Act (5 U.S.C. §§ 554 and 556 (1970)).

APPEARANCES: Alvis Smith, Sr., for appellants.

OPINION BY MR. SABAGH INTERIOR BOARD OF INDIAN APPEALS

The probate of the estate of Hiemstennie (Maggie) Whiz Abbott, an enrolled and allotted Yakima Indian of the State of Washington, was the subject of a hearing held on October 14, 1971. Judge Snashall denied the validity of a purported last will and testament dated March 2, 1970, leaving decedent's entire estate to a niece, Ramona Whiz Smith, because of: (1) the legal incompetence of the decedent; (2) the legal incompetence of one of the witnesses to the will; and (3) because of a presumption of undue influence in the making and execution of the will. The appellants are the children of the subsequently deceased

sole devisee named in the decedent's will.

The Judge decreed that after payment of costs of administration and subject to allowed claims, the trust estate should be distributed to Doris Imogene Whiz Berkybile, the sole surviving heir at law.

A petition for rehearing was denied on June 1, 1972, and an appeal was filed by Alvis Smith, Sr., as guardian ad litem for and on behalf of the children of the devisee subsequently deceased. The appellants, among other things petition the Board to consider the whole record in this cause, which petition we hold satisfies the requirements of 43 CFR 4.291.

The grounds for the appeal are identical to those referred to in the appellants' petition for rehearing and official notice is taken thereof.

The appellants, among other things, contend that the minor children of Ramona Smith were not previously advised or represented by counsel.

A rehearing will be granted where the original hearing did not conform with the standards of a full opportunity to be heard embodied in the Administrative Procedure Act, 5 U.S.C. §§ 554 and 556 (1970); *Estate of Joseph Red Eagle*, 2 IBIA 43; 80 I.D. 534 (1973).

It does not appear from an examination of the record that the children of Ramona Whiz Smith were represented by counsel. It does appear from the transcript that Alvis Smith, Sr. was appointed by the Judge as their guardian ad litem at the only hearing held (Tr. 24),

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and that he requested a continuance of the hearing in order that he as guardian ad litem of the minor children could be represented by counsel (Tr. 32) which request was denied.

We note the colloquy between the Judge and Alvis Smith, Sr. concerning the matter of continuance (Tr. 32, 33), and the Judge's statement in his order denying petition for rehearing (Order Denying Petition For Rehearing, p. 1, par. 4.) which statement is nowhere substantiated in the record.

We cannot agree that the minor children of Ramona Whiz Smith were granted a full opportunity to be heard.

The Board turns its attention now to the record itself. It is noted that in addition to the transcript of the October 14, 1971 hearing, the record includes several affidavits which purportedly are detrimental to the interests of the devisee's minor children. The affidavits were not tendered or admitted in evidence, and the affiants were never subjected to cross-examination. It is further noted that reliance is given, in the Order of March 10, 1972 disapproving the will and decree of distribution, to purported evidence included in the records of other estates already probated. (*Estate of Ramona Whiz Smith*, IP PO 466L 71-65); *Estate of Nocktusie Willie William Whiz, Sr.*, IP PO 467L 71-66.)

There is no indication that the above were incorporated into the proceedings of October 14, 1971, by being submitted for identification

and introduction into evidence, nor were the interested parties afforded an opportunity to see and refute same during the course of the hearing or afterward.

It is also noted that the Judge made no findings of fact, as such. See *Estate of Lucille Mathilda Callous Leg Ireland*, 1 IBIA 67, 78 I.D. 66 (1971); *Estate of Joseph Red Eagle*, 2 IBIA 43, 80 I.D. 534 (1973).

The Board is not unmindful of the trials and tribulations of an Administrative Law Judge in matters such as these. However, due process dictates the manner in which one must proceed.

We find that the minor children of Ramona were not granted a full opportunity to be heard; that the evidence considered by the Judge was not incorporated into the record; and that no findings of fact were made.

Therefore, we remand the case for rehearing so that the record shall include inter alia, a transcript including therein, all relevant testimony and documentary evidence admitted at the hearing relating to: (1) the issue of competency of the testatrix and one of the witnesses to the will of Hiemstennie (Maggie) Whiz Abbott, deceased; and (2) the issue of undue influence. The Judge shall then issue a decision including findings of fact and conclusions of law based upon the record.

NOW THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR

4.1, we REVERSE the order denying the petition for rehearing and REMAND the matter to the Administrative Law Judge for rehearing to determine heirs, and to approve or disprove the will.

MITCHELL J. SABAGH, *Member*.

I CONCUR:

DAVID J. MCKEE, *Chairman*.

**ESTATE OF ROSE JOSEPHINE
LaROSE, WILSON, ELI (DECEASED)**

2 IBIA 60

Decided September 14, 1973

The appeal is from a decision denying a petition for reopening. This is a notice of docketing of the appeal and a decision of remand for further hearing dispensing with the filing of briefs by interested parties.

Docketed, reversed and remanded.

375.0 Indian Probate: Reopening: Generally—

130.6 Indian Probate: Appeal: Standing to Appeal

Although the Superintendent of an Indian Agency has no interest in the outcome he is a proper official of the Bureau of Indian Affairs to file a petition for reopening and to appeal from a denial thereof under authority of 43 CFR 4.242 (d).

105.1 Indian Probate: Administrative Procedure: Applicability to Indian Probate

The requirement of the Administrative Procedure Act, that all decisions of a Judge shall include a statement of findings and conclusions, on all the material issues of fact, law, or discretion presented

on the record, is mandatory and applicable to all decisions of Judges in Indian Probate proceedings.

105.2 Indian Probate: Administrative Procedure: Official Notice, Record

Official notice of documents and records will not be taken unless they are introduced in evidence or unless an order or stipulation provides to the contrary.

425.20 Indian Probate: Wills: Proof of Will

No will can be approved as self-proved unless the record supports a finding by the Judge that such will and the affidavits accompanying it have been presented at the hearing to all parties present for consideration and that it is uncontested. Such findings may then support a conclusion that the documents meet the requirements of 43 CFR 4.233 (a), and that it may be ordered approved.

APPEARANCES: Richard K. Aldrich, for the Field Solicitor, Billings, Montana, appearing for the Bureau of Indian Affairs (Superintendent of the Flathead Agency), appellant. There has been no appearance made for the appellees.

*OPINION BY MR. MCKEE
INTERIOR BOARD OF
INDIAN APPEALS*

The final order approving will and decree of distribution was entered in this matter on the 29th of September, 1972. Subsequently, a petition for reopening within the provisions of 43 CFR 4.242 was filed with the Administrative Law Judge Robert C. Snashall, on July 5, 1973, by Albert M. Rennie, Acting Superintendent for the Flathead Indian Agency. The petition for reopening was denied by the

Judge on July 20, 1973, and a notice of appeal was timely filed on August 10, 1973, by the Bureau of Indian Affairs. The record of the case was transmitted by the title plant in Portland and was received by this Board on August 27, 1973.

NOTICE IS HEREBY GIVEN: That a notice of appeal has been filed by the Bureau of Indian Affairs, acting through its attorney, the Field Solicitor of the Department of Interior, Billings, Montana. This is docketed as an appeal under the above designated number.

The decedent, Rose Josephine Eli, Allottee No. 101, was a Northern Idaho Indian who died testate February 7, 1972. By his order of September 29, 1972, the Judge approved a will dated "November 17, 1971." He ordered, distribution made to Jonathon James Tsoodle of one third of the residue of the estate including land interests on the Flathead Indian Reservation in Montana. The following statement is found in the appellant's petition for reopening dated July 2, 1973, in regard to such order.

1. The order, approving the will and decree of distribution, dated September 29, 1972, No. IP PO 187L 72-301, does not comply with the Indian Reorganization Act of June 18, 1934 (25 U.S.C. 464). The devisee, Jonathon James Tsoodle, named in paragraph V(c) of the Last Will and Testament, executed November 11, 1971, is not an heir at law. He is the son of Elizabeth Tsoodle, who is living, and the grandson of Rose Josephine LaRose Eli, deceased. This information is contained in paragraph I and V(c) of the decedent's Last Will and Testament.

Section 4 of the Act (25 U.S.C. § 464) prevents testamentary disposition of land interests on an organized reservation to anyone who is not either an heir of the testator or a member of the tribe having jurisdiction of the land in question.

The Confederated Tribes of the Flathead Reservation voted to come under the Act. As long as the intermediate parent is still living it is undisputed that the grandchild of a decedent cannot be the heir of the decedent under the laws of the State of Montana. Furthermore, there is no showing that Jonathon James Tsoodle is an enrolled member of the Flathead Tribes, and he is therefore ineligible to receive the devise of the Flathead interests made to him by his grandmother.

Disregarding the foregoing statute and law the Judge made the following statement in his order of July 20, 1973, in which he denied the petition for reopening.

I am not unmindful of the dictates of the Wheeler-Howard Act (25 U.S.C. § 464) nor of the cases holding the primary purpose of section 4 of the Act to prevent the alienation of restricted Indian lands to strangers. (Citing cases.) But in view of the fact it can hardly be said devisee, Jonathon James Tsoodle is a "stranger" to the lands of his grandmother and the amount in question is *de minimus* it appears reopening of this estate for the purposes outlined in the petition of July 5, 1973 is unwarranted.

We cannot agree with the Judge, and we reaffirm the conclusion reached by the Solicitor in *Estate of Chris Trudell*, IA-D-6 (March 16, 1967); *Estate of Emma Blowsnake*

Goodbear Mike, A/K/A Emma Walking Priest, IA-916 (October 26, 1960). Therefore his decision in this matter should be reversed.

This decision disposes of the single purely legal ground advanced by the appellant which is a proper party although it has no interest in the outcome. *See Estate of Ellen Fitzpatrick, IA-T-5* (Supp.) (November 5, 1968); *Estate of Gi-we-bi-nes-i-kwe, IA-D-19* (March 1, 1968); *Estate of Billy Smith, A/K/A Billy Pecwan, IA-S-3* (December 31, 1969); 25 CFR 1.2 and 43 CFR 4.242(d).

This matter could be disposed by the foregoing decision, but further examination of the record reveals that there are additional reasons for reopening the estate. Further hearing in connection with the approval of the will and the determination of the decedent's heirs under the laws of the various states in which decedent held land interests is needed for the following reasons.

As noted above, in his order of September 29, 1972, the Judge approved a will dated "November 17, 1971," but no such will was found in the record. There is a xerox copy of a document purported to be the Last Will and Testament of Rose Mary Eli, dated "November 11, 1971."

The *only* reference to the will at the hearing held at Lapwai, Idaho, on August 22, 1972, is as follows:

JUDGE: Alright, each of those claims will be allowed. Now, as I understand it, I believe when I asked you off the record you stated that you were familiar with

the Last Will and Testament of your wife, Rose Eli, dated the 17th [sic] of November 1971, is that correct—you are familiar with what it says?

GIBSON ELI: Yes.

Q. Are you familiar too Elizabeth?

ELISABETH TSOODLE: Yes.

Q. Then do I understand it you will waive the reading of the will then now?

GIBSON ELI: Yes.

ELIZABETH TSOODLE: Yes. (tr. 3-4.)

Since this is the only evidence in the record concerning any will, the provisions of 43 CFR 4.233 concerning self-proved wills have not been met even if it is assumed, which we do not, that the will under consideration at the hearing was the one dated "November 11, 1972," rather than the one dated "November 17, 1972." Under the decisions, in *Estate of Charles Cordier* (41560-38) and *Estate of Charles Clement Richard, IA-1260* (July 15, 1963), there must be sufficient credible testimony in the record to support a finding that the will in question and the accompanying affidavits meet the requirements of 43 CFR 4.233 (a). Furthermore, the original must be either offered in evidence or accounted for to defeat any presumption that the original was destroyed by the testatrix with an intent to revoke it.

A further deficiency in the proceedings is noted in that although the Judge did appoint Elizabeth Tsoodle as the guardian for her son Jonathon as a minor, there is no indication as to his age or birth date.

More importantly, however, it appeared at the hearing that the decedent's son, Leon Alexander is and

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was a mental incompetent, but no guardian ad litem was appointed for him. The true legal status of Leon Alexander shall first be determined, and if appropriate, a guardian ad litem should be named to represent his interests in further proceedings. In any event, notice of all further proceedings shall be given to him, or his guardian ad litem or to his personal representative duly appointed and qualified under an order of a court of the State of his residence. He or his guardian must then be given an opportunity to object to whatever will is under consideration.

A finding is made that the record in this matter is inadequate as it does not sustain the approval of the will dated November 11, 1972, or one dated November 17, 1972. A finding is made that the case should be reopened and remanded. Further hearing shall accordingly be held for correction of the record at which time official notice of documents and records will not be taken unless they are introduced in evidence or an order or stipulation provides to the contrary.

The requirement of the Administrative Procedure Act, that all decisions of a Judge shall include a statement of findings and conclusions, on all the material issues of fact, law, or discretion presented on the record, is mandatory and applicable to all decisions of Judges in Indian Probate proceedings.

A further finding is made that no purpose would be served by providing for the filing of statements or

briefs by any party at this point and none will be accepted.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, we REVERSE the order denying the petition for reopening; and do hereby reopen the probate; and we REMAND the case to the Administrative Law Judge for a rehearing, and he shall issue a decision including findings of fact as to whether this decedent died leaving a valid will, and as to who her heirs may be, and to make such final order of distribution as may be indicated, subject to the right of appeal, all pursuant to 43 CFR 4.200 *et seq.*

It is further ordered that the Judge may in his discretion order the payment of allowed claims and fees pending issuance of the final decision in this case.

DAVID J. MCKEE, *Chairman.*

I CONCUR:

MITCHELL J. SABAGH, *Member.*

PETER I. WOLD, II
WESTERN STANDARD
CORPORATION

13 IBLA 63

Decided September 17, 1973

Appeal from decision of Wyoming State Office, Bureau of Land Management, rejecting applications for preference right coal leases.

Set aside in part and remanded.

**Coal Leases and Permits: Generally—
Coal Leases and Permits: Leases—Coal
Leases and Permits: Permits—Mineral
Leasing Act: Generally**

The holder of a coal prospecting permit is entitled to a lease pursuant to section 2 of the Mineral Leasing Act of 1920, *as amended*, 30 U.S.C. § 201(b) (1970), if he shows to the satisfaction of the Secretary of the Interior that the land contains coal in commercial quantities discovered prior to the expiration of his permit.

**Administrative Procedure: Hearings—
Coal Leases and Permits: Generally—
Coal Leases and Permits: Leases—Coal
Leases and Permits: Permits—Rules of
Practice: Hearings**

A coal prospecting permittee who applies for a coal lease, alleging with supportive data that there is coal in commercial quantities within certain lands in his permit, is entitled to a hearing conducted in accordance with the Administrative Procedure Act, 5 U.S.C. § 554 (1970), before his application may be rejected because he has not shown coal in commercial quantities.

APPEARANCES: Robert L. Raforth, Manager, Mineral Operations, Western Standard Corporation; Peter I. Wold, II, *pro se*.

OPINION
BY MRS. THOMPSON
**INTERIOR BOARD OF LAND
APPEALS**

This appeal by Peter I. Wold, II, and Western Standard Corporation, as assignee of Wold's rights under coal prospecting permits and coal preference right lease applications, is from a decision dated

December 8, 1972, of the Wyoming State Office, Bureau of Land Management. The decision rejected in their entirety applications for preference right leases pursuant to coal prospecting permits W-10255, W-10256, and W-10257, embracing 2,080 acres for the three applications. The appeal pertains only to 480 acres within W-10255 and W-10256.¹

The prospecting permits originally issued June 1, 1968, for two years and were subsequently extended for another two years. The lease applications were filed May 30, 1972, pursuant to section 2 of the Mineral Leasing Act of 1920, *as amended*, 30 U.S.C. § 201(b) (1970), which provides that if the "permittee shows to the Secretary that the land contains coal in *commercial quantities*, the permittee shall be entitled to a lease * * * for all or part of the land in his permit." [Italics added.]

The State Office based its rejection of the applications upon a report to it from the Geological Survey concluding that drill hole records and information submitted by the permittee to Survey had failed to disclose there was coal in commercial quantities discovered on the

¹ These lands are all within T. 42 N., R. 69 W., 6th P.M., Campbell County, Wyoming.

W-10255

Sec. 20: N $\frac{1}{2}$ NW $\frac{1}{4}$

Sec. 22: E $\frac{1}{2}$ SW $\frac{1}{4}$

Sec. 27: NE $\frac{1}{4}$, NE $\frac{1}{4}$ NW $\frac{1}{4}$

W-10256

Sec. 27: W $\frac{1}{2}$ SE $\frac{1}{4}$, NE $\frac{1}{4}$ SE $\frac{1}{4}$

As appellants have "accepted" the rejection as to the lands within W-10257, and the remainder of the lands within W-10255 and W-10256, the decision appealed from is final as to the rejection of those lands.

lands during the terms of the permits. Specifically, as to the two permits in question, Survey reported:

W-10255

Applicant drilled 26 holes on the land under application and found coal of commercial thickness in only four of these holes. The four holes were widely scattered and other holes in their immediate vicinity show the coal seam completely burned.

W-10256

Applicant drilled 19 holes on the land under application and found coal of commercial thickness in only three of these holes. The holes encountering coal were at widely scattered locations with many intermittent barren holes.

Appellants contend that there is coal in commercial quantities within the 480 acres involved in this appeal. They calculate maximum potential reserves totaling 18.5 million tons within that acreage. They have submitted maps, cross section diagrams, and drill logs, with some explanations, to support their contention that they have made an adequate showing as to the lands involved in the appeal.

If, in fact, a permittee shows that the land contains coal in commercial quantities discovered prior to the expiration of the permit, the permittee would be entitled under the law to a lease. *See Emil Usibelli*, 60 I.D. 515 (1951). The law places the burden of showing sufficient data and information for ascertainment of the facts upon the permittee. *Cf. Wolf Joint Venture*, 75 I.D. 137 (1968). In *Wolf* a hearing was ordered at which the applicants, as

well as the Government, could present evidence on questions of fact. While *Wolf* and a companion case, *Kaiser Aluminum and Chemical Corporation*, A-30982 (May 3, 1968), involved applications for leases pursuant to sodium prospecting permits, the issues involved are comparable to those involved here.²

Appellants have shown the existence of some coal, but whether there exists coal in commercial quantities, as alleged, cannot be determined properly from the record before us. Before the applications are finally rejected as to the lands involved in this appeal on a finding that the factual condition prerequisite to the statutory entitlement to a lease has not been met, the applicants are entitled to a hearing before an administrative law judge in accordance with the provisions of the Administrative Procedure Act, 5 U.S.C. § 554 (1970). *Wolf Joint Venture*, *supra*; *Kaiser Aluminum and Chemical Corporation*, *supra*; *cf. Don E. Jonz*, 5 IBLA 204 (1972); *United States v. O'Leary*, 63 I.D. 341 (1959); *Claude E. Crumb*, 62 I.D. 99 (1955).³

² The hearing ordered in *Wolf* never took place because of a subsequent satisfactory showing by the applicants and an agreement between them and Government officials obviating the necessity for the fact-finding procedure. *See Wolf Joint Venture*, A-30978 (Supp.) (June 30, 1971).

³ We note that the Secretary of the Interior's Order No. 2952, dated February 13, 1973, directed that coal prospecting permit applications be rejected until further notice. It expressly stated, however, that no rights of holders of prospecting permits issued prior to the Order would be restricted by the directive. Therefore, it in no way affects the conclusion reached in this decision.

This case shall be remanded to the State Office for referral to Survey to consider all the information pertaining to the 480 acres in question. If Survey determines that the reduced area does not contain commercial quantities of coal, due notice to the applicants, through the State Office, BLM, shall be given, advising them of the basis for the determination and that they may request a hearing before an administrative law judge on their entitlement to a lease. If the applicants then request a hearing, the case shall be transmitted to the Hearings Division for assignment to a judge, in accordance with this instruction. At such a hearing, the applicants shall have the burden of going forward with evidence to establish that they discovered coal in commercial quantities prior to the expiration of their permit, and the ultimate risk of non-persuasion on that question. *Wolf Joint Venture, supra.*

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside in part as to the lands involved in this appeal and remanded to the Wyoming State Office, BLM, for further appropriate action consistent with this decision.

JOAN B. THOMPSON, *Member.*

WE CONCUR:

EDWARD W. STUEBING, *Member.*

JOSEPH W. GOSS, *Member.*

ZEIGLER COAL COMPANY

2 IBMA 216

Decided *September 18, 1973*

Appeal by the Bureau of Mines (now the Mining Enforcement and Safety Administration) from an initial decision by an Administrative Law Judge (VINC 72-71-P), dated February 1, 1973, vacating a notice of violation citing section 302(a) of the Federal Coal Mine Health and Safety Act of 1969 and assessing a civil monetary penalty of \$500 for a violation of section 304(a).

Affirmed as modified.

Federal Coal Mine Health and Safety Act of 1969: Mandatory Safety Standards: Generally

Where the evidence is sufficient to establish that the roof or ribs of a mine were not adequately supported to protect persons from falls, it is not necessary to prove a violation of the roof control plan in order to sustain a violation of section 302(a) of the Act.

Federal Coal Mine Health and Safety Act of 1969: Hearings: Procedure

An Administrative Law Judge does not have the power or authority to convert an order of withdrawal to a notice of violation.

Federal Coal Mine Health and Safety Act of 1969: Hearings: Procedure

An Administrative Law Judge may not vacate an order of withdrawal in a civil penalty proceeding held pursuant to section 109(a) (3).

APPEARANCES: Robert W. Long, Associate Solicitor, J. Philip Smith, Assistant Solicitor, Madison McCul-

loch, Trial Attorney, on behalf of appellant, U.S. Bureau of Mines (now Mining Enforcement and Safety Administration); J. Halbert Woods, Esquire, J. Roy Browning, Esquire, on behalf of appellee, Zeigler Coal Company.

OPINION BY MR. ROGERS

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Factual and Procedural Background

An inspection conducted on September 16, 1970, of the Murdock Mine operated by Zeigler Coal Company (Zeigler) resulted in the issuance of a notice citing a violation of section 302(a) of the Federal Coal Mine Health and Safety Act of 1969 (Act).¹ A subsequent inspection conducted on January 19, 1971, resulted in the issuance of an order of withdrawal pursuant to section 104(a) of the Act which alleged the following condition:

Excessive accumulation of loose coal and coal dust were present along the belt conveyor in the slope entry for the entire length of the slope. The rock dust application was obviously inadequate for the entire length of the slope.

The Bureau of Mines (now MESA) filed a petition for assessment of civil penalties pursuant to section 100.4(i) of Title 30, Code of Federal Regulations, on June 1, 1972, for the violations alleged in the notice and the order of withdrawal. A hearing was held on No-

vember 21, 1972, and on February 1, 1973, the Administrative Law Judge (Judge) issued an initial decision converting the order of withdrawal to a notice of violation of section 304(a), assessing a penalty of \$500 therefor, and vacating the notice of violation of section 302(a).

Contentions of the Parties

The Bureau contends the Judge erred in vacating the notice of violation of section 302(a) and in holding that a violation of that section may be established only by proof that the operator had violated his roof control plan. The Bureau alleges that a dangerous roof condition constitutes a violation of the Act regardless of the requirements of the roof control plan. The Bureau also challenges the authority of a Judge to vacate an order of withdrawal and convert it to a notice of violation in a civil penalty proceeding.

Zeigler responds that in order to prove a violation of section 302(a) it is necessary to first prove a violation of the roof control plan required by that section. Zeigler further argues that if the Judge erred in vacating an order of withdrawal in a civil penalty proceeding, the error was harmless.²

Issues Presented

I. Is it necessary to prove a violation of a roof control plan in order to sustain a violation of section 302(a) of the Act?

¹ P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1969).

² A notice of appeal by Zeigler was untimely filed and, therefore, not accepted by the Board.

II. Does the Administrative Law Judge have the power or the authority to vacate an order of withdrawal in a civil penalty proceeding?

III. Does the Administrative Law Judge have the power or the authority to issue a Notice of Violation?

I

In relevant part, section 302(a) of the Act provides:

Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form within sixty days after the operative date of this title. * * *

The Board believes that both the clear meaning of the words and the legislative intent mandate that section 302(a) be interpreted as requiring both a safe roof and a roof control plan approved by the Bureau. This Board takes official notice that roof falls rank high as a cause of serious accidents in underground mines. In light of this fact we cannot conceive that Congress intended that the mere filing and subsequent approval of a roof control plan [by its nature a minimum requirement] would absolve operators from the duty of con-

stantly maintaining safe roof conditions in underground mines.

In its report to the U.S. House of Representatives, the Committee on Education and Labor made the following analysis of this subsection:

* * * Subsection (a) of this section requires each operator of a mine to undertake to carry out on a continuing basis, a program to improve the roof control system of each mine, and a method to accomplish such system. This subsection also requires that all active underground roadways, travelways, and working places be supported or otherwise controlled. * * *

The report agreed upon in conference by members of the House and Senate did not alter this interpretation. In a complete section-by-section analysis of the conference report submitted during the Senate debate on that report the dual requirement of this subsection was acknowledged with the following statement:

Subsection (a) requires that all active underground roadways, travelways, and working places be supported adequately and that a roof control plan suitable to the roof conditions and mining system be adopted for each mine by the operator and submitted to the Secretary for approval.⁴

The requirement of a plan, in our view, serves to alert an operator to the seriousness of roof falls and to some extent assures minimum and uniform compliance throughout the industry. Roof control plans were not designed to immunize an opera-

³ H.R. Rep. No. 563, 91st Cong., 1st Sess. 42 (1969).

⁴ 91 CONG. REC. 39,989 (1969) (remarks of Senator Williams of New Jersey).

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tor from notices of violation for bad roofs. We cannot conceive that Congress envisaged a prolonged administrative process commencing with a notice to an operator of a bad roof, the subsequent filing of a revision or change in roof control plan, and approval by the Secretary before a dangerous roof condition could be ordered corrected. All circumstances considered, we are compelled to hold that an operator is under a duty to maintain a safe roof irrespective of any roof control plan and that the failure to do so constitutes a violation of the mandatory safety standard of section 302(a). To hold otherwise, we believe would do violence to the stated objectives of the Act.

The record supports the finding that the roof in the area described in the notice of violation was not adequately supported; indeed, the roof at two crosscuts had already begun to fall. We further find that the record is sufficient to permit the assessment of a penalty by the Board. Having concluded that a violation did occur, and considering the relevant discussion by the Judge, the Board makes the following findings: (1) since there is no evidence relating to the issue of whether Zeigler has a history of previous violations, the Board finds that there is no such history to be considered; (2) the penalty imposed by the Board is appropriate for an operator producing approximately 4,000,000 tons of coal annually from four coal mines and employing 1,102 people; (3) the operator was negli-

gent in failing to maintain a safe roof in this area; (4) since there is no evidence that the penalty will have an adverse effect on the ability of Zeigler to remain in business, the Board finds that no such result may be expected; (5) the existence of this unsupported roof presented a serious danger to anyone who might pass under it (consideration has been given to the fact that this was not a highly traveled area of the mine); and (6) the operator demonstrated good faith in achieving immediate abatement after notice.

The Board assesses a penalty of \$200 for this violation.

II

Since this proceeding arises as a penalty assessment procedure under section 109 of the Act, the sole issues to be determined are the validity of the charges of violation and the subsequent assessment of civil penalty. In assessing penalties for those proved violations, consideration must be given to six statutory criteria and such other circumstances as may reasonably enter into the determination as mitigating. The question of the validity of the order of withdrawal is not in issue. The conditions and practices cited in an order collectively may be weighed by the Judge in his consideration of the gravity of the violations. This is not to say that the mere existence or issuance of an order is itself a consideration but merely that the conditions and practices cited in an order, and proved

as violations, may be considered in combination in determining the gravity of the violations. We do not suggest that either Administrative Law Judges or this Board should blindly accept the issuance of a withdrawal order as evidence of gravity. Independent determinations as to gravity should be made irrespective of the existence of a withdrawal order. Therefore, since the validity of such an order is not an issue in a section 109 proceeding for assessment of penalty it is error for a Judge to either sustain or vacate such order. In so ruling we take cognizance of the fact that section 105(a) affords an opportunity to challenge the validity of orders of withdrawal issued by MESA.

III

The Board rejects the proposition that a Judge has the authority to issue a notice of violation by converting an order of withdrawal into a notice. Section 104(b), cited by the Judge as authority for his conversion of an order to a notice, provides that an authorized representative of the Secretary may issue notices of violation. In our opinion a Judge is not an "authorized representative" within the meaning of the Act. The powers of an Administrative Law Judge are delineated in 43 CFR 4.582. Neither the Act nor the rules empowers a Judge to make such a conversion. See *Freeman Coal Mining Corporation*, 2 IBMA 197, 80 I.D. 610 (1973).

Upon review, we find no error insofar as a violation of section

304(a) was found and a proper and reasonable penalty assessed. Therefore, we sustain the Judge's decision on this count. However, we hold that conversion by an Administrative Law Judge of an order of withdrawal to a notice of violation in a proceeding brought under section 109 of the Act is improper and unauthorized.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that:

(1) The Judge's decision is modified to reflect a violation of section 302(a), and a penalty of \$200 is assessed for that violation;

(2) The Judge's decision imposing a civil monetary penalty of \$500 for a violation of section 304(a) IS AFFIRMED; and

(3) Zeigler Coal Company pay a total assessment of \$700 on or before October 17, 1973.

C. E. ROGERS, JR., *Chairman*.

I CONCUR:

DAVID DOANE, *Member*.

BUFFALO MINING COMPANY

2 IBMA 226

Decided September 20, 1973

Appeals by Buffalo Mining Company from three decisions of Edmund M. Sweeney, Administrative Law Judge (Docket Nos. HOPE 72-81-P, 72-65-P,

as violations, may be considered in combination in determining the gravity of the violations. We do not suggest that either Administrative Law Judges or this Board should blindly accept the issuance of a withdrawal order as evidence of gravity. Independent determinations as to gravity should be made irrespective of the existence of a withdrawal order. Therefore, since the validity of such an order is not an issue in a section 109 proceeding for assessment of penalty it is error for a Judge to either sustain or vacate such order. In so ruling we take cognizance of the fact that section 105(a) affords an opportunity to challenge the validity of orders of withdrawal issued by MESA.

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(3) Zeigler Coal Company pay a total assessment of \$700 on or before October 17, 1973.

C. E. ROGERS, JR., *Chairman*.

I CONCUR:

DAVID DOANE, *Member*.

BUFFALO MINING COMPANY

2 IBMA 226

Decided September 20, 1973

Appeals by Buffalo Mining Company from three decisions of Edmund M. Sweeney, Administrative Law Judge (Docket Nos. HOPE 72-81-P, 72-65-P,

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72-150-P), ordering Buffalo Mining Company to pay civil penalties totaling \$2,900 assessed pursuant to section 109(a) of the Federal Coal Mine Health and Safety Act of 1969.

Affirmed as modified.

Federal Coal Mine Health and Safety Act of 1969: Hearings: Powers of Administrative Law Judges

The Administrative Law Judge properly denied the motion of an operator to suppress evidence obtained in the course of a coal-mine inspection, where such motion is based on the ground that the inspector violated the Fourth Amendment prohibition against unreasonable searches, since an administrative tribunal has no authority to pass on constitutional questions.

Federal Coal Mine Health and Safety Act of 1969: Inspections and Investigations

It was the clear intent of Congress to require neither a search warrant nor the express consent of an operator, before an inspection of a coal mine, under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §§ 813(b), 815. *Clinchfield Coal Company*, 1 IBMA 70a, 79 I.D. 655, CCH Employment Safety and Health Guide par. 15,370 (1971).

Federal Coal Mine Health and Safety Act of 1969: Validity of Regulations

The Board of Mine Operations Appeals has no authority to determine the impact, if any, the requirements of the National Environmental Policy Act and Executive Orders issued with respect thereto may have on the validity of substantive regulations promulgated by the Secretary under the Federal Coal Mine Health and Safety Act of 1969, since the power to declare such regulations invalid lies outside the scope of the Board's delegated jurisdiction. 43 CFR 4.500.

Federal Coal Mine Health and Safety Act of 1969: Penalties: Penalty Against Operator

Since the hearing conducted by an Administrative Law Judge in a penalty proceeding brought under section 109 of the Act is *de novo*, penalties assessed by the Judge, otherwise valid, are not unlawful solely because they are higher than the informally proposed assessments.

Federal Coal Mine Health and Safety Act of 1969: Penalties: Presumptions: Ability to Continue in Business

The application of the legal presumption that there is no adverse effect of a penalty assessment on the operator's ability to continue in business in the absence of contrary evidence produced by the operator, places no unlawful or unjust burden upon the operator since such evidence is under the exclusive control of the operator and is probative only of a mitigating consideration for the operator's own benefit. 30 U.S.C. § 819(a) (1).

Federal Coal Mine Health and Safety Act of 1969: Penalties: Presumptions: Size of Business

The criterion of the appropriateness of a penalty to the size of an operator's business under section 109(a) (1) of the Act does not require the creation of a legal presumption because the factual information needed to apply such criterion in determining the amount of the penalty should be readily ascertainable by MESA. 30 U.S.C. § 819(a) (1).

Federal Coal Mine Health and Safety Act of 1969: Administrative Procedure: Proposed Findings, Conclusions or Exceptions

The requirement of the Administrative Procedure Act, that the record shall show the ruling on each finding, conclusion, or exception presented, can be satisfied without a specific separate ruling on each pro-

posed finding, conclusion or exception; provided the total decision sufficiently informs a party of the disposition of all its proposed findings and conclusions or exceptions. 5 U.S.C. § 557(c).

Federal Coal Mine Health and Safety Act of 1969: Findings

Where an Administrative Law Judge fails to make the required express findings of fact regarding any of the six statutory criteria, required by section 109(a)(1) of the Act, to be considered in determining the amount of a penalty warranted, in lieu of a remand, the Board may make the appropriate findings for the Department in accordance with the evidence of record. 30 U.S.C. § 819(a)(1).

Federal Coal Mine Health and Safety Act of 1969: Findings

Where an Administrative Law Judge makes findings of fact regarding any of the six statutory criteria required by section 109(a)(1) of the Act to be considered in determining the amount of the penalty warranted, but in so doing, ignores or fails to properly apply the evidence of record, the Board may substitute its findings to coincide with the evidence and adjust the amount of the penalty assessed accordingly. 30 U.S.C. § 819(a)(1).

Federal Coal Mine Health and Safety Act of 1969: Unavailability of Equipment, Materials, or Qualified Technicians: Notice of Violation

Congress never intended that a notice of violation under section 104(b) of the Act be issued, or that a civil penalty be assessed, where compliance with a mandatory health or safety standard is impossible due to the unavailability of equipment, materials or qualified technicians. 30 U.S.C. §§ 814(b), 814(h), 819.

Federal Coal Mine Health and Safety Act of 1969: Unavailability of Equipment, Materials, or Qualified Technicians: Section 104(h) Notices

Where an inspector observes a condition in a coal mine constituting a health or safety hazard and is aware that the operator cannot abate such condition because of the unavailability of equipment, materials or qualified technicians, he should issue a notice under section 104(h) of the Act; provided, he is reasonably sure that continued mining operations will develop into an imminent danger. 30 U.S.C. § 814(h).

Federal Coal Mine Health and Safety Act of 1969: Unavailability of Equipment, Materials, or Qualified Technicians: Generally

Where an inspector observes a condition in a coal mine constituting a health or safety hazard, and is aware that the operator cannot abate such condition because of the unavailability of equipment, materials, or qualified technicians, he should not issue a notice to the operator, either under section 104(b) or section 104(h) of the Act, if he is reasonably sure that continued mining operations will not develop into an imminent danger. 30 U.S.C. §§ 814(b), 814(h).

Federal Coal Mine Health and Safety Act of 1969: Closure Orders: Imminent Danger

Regardless of the unavailability of equipment, materials, or qualified technicians, an inspector is obliged to issue an order of withdrawal under section 104(a) of the Act, where, upon any inspection of a coal mine, he finds that an imminent danger exists. 30 U.S.C. §§ 814(a), 814(h).

Federal Coal Mine Health and Safety Act of 1969: Hearings: Burden of Proof

While the burden of proving unavailability of equipment, materials, or qualified technicians required to comply with a mandatory health or safety standard is normally upon the operator, where the government's proof establishes such un-

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availability, the operator is relieved of the burden and may rely upon the government's evidence.

Federal Coal Mine Health and Safety Act of 1969: Mandatory Safety Standards: Trailing Cable Splices

Where the evidence shows an operator made a defective permanent splice in a trailing cable in violation of 30 CFR 75.604, the Administrative Law Judge did not err by finding that a violation occurred or by holding that the defective permanent splice may not be deemed to be a permissible temporary splice.

APPEARANCES: Robert P. Reineke, Esquire, Wesley C. Marsh, Esquire, Raymond E. Davis, Esquire, for appellant, Buffalo Mining Company; Robert W. Long, Associate Solicitor, J. Philip Smith, Assistant Solicitor, Mark M. Pierce, Trial Attorney, for appellee, U.S. Bureau of Mines.

*OPINION BY MR. DOANE
INTERIOR BOARD OF MINE
OPERATIONS APPEALS*

Procedural Background

These cases arise under the Federal Coal Mine Health and Safety Act of 1969 (hereinafter, the "Act").¹ They come to the Board as appeals from three separate decisions of an Administrative Law Judge (Judge) issued November 24, 1972, December 8, 1972, and December 4, 1972, under Docket Nos. HOPE 72-81-P, HOPE 72-65-P, and HOPE 72-150-P, respectively. The respective appeal numbers assigned are IBMA 73-18, IBMA

73-22, and IBMA 73-23. The first case involves No. 5 Mine, and the other two involve the No. 8 Mine, both operated by Buffalo Mining Company (Buffalo), a wholly-owned subsidiary of the Pittston Company. For convenience, we have consolidated these three appeals since several principal issues raised by Buffalo, as appellant, are common to all three. Hearings were held before the Judge on these cases on August 8-10, and 14, 1972, and oral argument was held before this Board on March 21, 1973.

In each of these cases, Buffalo moved the hearing Judge to suppress all evidence offered by the Bureau of Mines (MESA)² to prove the cited violations of mandatory safety standards under the Act on the ground that such evidence was obtained by unlawful searches in that the inspections of the mines were conducted without first obtaining search warrants or the express consent of Buffalo.

Although not challenged in the proceedings below, Buffalo, in these appeals before the Board also challenges the validity of Departmental regulations promulgated by the Secretary in implementation of the Act on the ground that the Secretary failed to comply with sections

² As of July 16, 1973, the responsibility for the administrative enforcement of the Act was transferred from the Bureau of Mines to the newly created Mining Enforcement and Safety Administration (hereinafter MESA), and it was directed that MESA be substituted for the Bureau of Mines in all proceedings, involving the Federal Coal Mine Health and Safety Act of 1969, pending before the Office of Hearings and Appeals. See 38 F.R. 18665 (July 13, 1973).

¹ P.L. 91-173, 83 Stat. 742, 30 U.S.C. §§ 801-960.

101 and 301 of the Act, and also failed to file an environmental impact statement, referred to in the National Environmental Policy Act (NEPA)³ and Executive Order No. 11514.⁴

In the proceeding docketed as HOPE 72-81-P (IBMA 73-18), Buffalo was cited for nine violations of mandatory safety standards under the Act and regulations. The Judge vacated three of these and assessed penalties for the remaining six in the total amount of \$2,200.

In the proceeding docketed as HOPE 72-65-P (IBMA 73-22), four alleged violations were the subject of the hearing. One was vacated by the Judge on finding that no violation occurred, and Buffalo was assessed a total of \$500 on the remaining three.

In the proceeding docketed as HOPE 72-150-P (IBMA 73-23), Buffalo was cited with one notice of violation and assessed a penalty of \$200.

Buffalo appeals the validity of all ten assessments made by the Judge on both general and specific grounds (discussed, *infra* part III).

MESA in its briefs, opposes all the contentions of Buffalo in these appeals and requests that the argument of Buffalo relating to noncompliance with NEPA be stricken since it was not raised in the proceedings below.

³National Environmental Policy Act of 1969, 88 Stat. 852, 42 U.S.C. § 4321 *et seq.* (1970).

⁴Exec. Order No. 11514, 3 CFR 285, 42 U.S.C. § 4321 (1970).

Issues Presented on Appeal

I

Whether motions of the operator to suppress the evidence of MESA to prove violations of mandatory safety standards were erroneously denied by the Administrative Law Judge where the source of such evidence was mine inspections made without search warrants or the express consent of the operator.

II

Whether the Board has authority under its delegation to determine the validity of the regulations promulgated by the Secretary to implement the Act under a charge that such regulations were not in compliance with the Act or with the National Environmental Policy Act (NEPA).

III

Whether the Administrative Law Judge erred in finding that violations of mandatory safety standards occurred or in assessing penalties with respect to the ten notices of violation involved in these appeals.

DISCUSSION

I

Search Warrant Question

Buffalo contends that the Judge on June 2, 1972, prior to hearing, erroneously denied its motion to suppress all the evidence to be offered by MESA on the alleged

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violations of the Act in all three proceedings, on the ground that such evidence was the product of unreasonable searches. The denial of these motions was based on this Board's Memorandum Opinion rendered in an interlocutory appeal, *Clinchfield Coal Company*, 1 IBMA 70a, 79 I.D. 655, CCH Employment Safety and Health Guide par. 15,370 (1971), wherein we expressed the view that sections 103 and 108 of the Act clearly show an intent by Congress not to require either a search warrant or the express consent of the operator before conducting an inspection of a coal mine.⁵ An appeal of this interlocutory ruling to the Fourth Circuit Court of Appeals was dismissed May 17, 1972, on the ground that Clinchfield had not exhausted its administrative remedies.⁶ On March 30, 1973, pursuant to remand by the Circuit Court, the Administrative Law Judge issued an order following the Board's ruling.

Buffalo argues that, in the *Clinchfield* opinion, *supra*, the

Board did nothing more than decline to consider the constitutionality of section 103 of the Act, and ignored the independent issue of whether the inspectors in these inspections violated the Fourth Amendment prohibition against searches made without warrants.

Essentially, Buffalo urges that the Board accept a distinction between the constitutional applicability of legislation applied to particular facts and the constitutional validity of the Act. That is to say, Buffalo claims that we may inquire into legislative intent, express, implied, or presumed although we are not entitled to take action in opposition to the will of Congress.

In support of its contentions, Buffalo calls our attention to Professor Davis' treatise. 3 Davis, *Administrative Law Treatise*, section 20.04. To our knowledge, the distinction pressed upon us by Buffalo originated with Professor Davis. He cites no case authority to support his position and our research has disclosed that the existing case law suggests that the distinction is without legal significance. An administrative tribunal may not entertain constitutional questions whether they deal with general validity or with applicability to particular facts. *Panitz v. District of Columbia*, 72 App. D.C. 131, 112 F. 2d 39 (D.C. Cir. 1940), *Public Utilities Commission of California v. United States*, 355 U.S. 534 (1958). Therefore, we hold that this Board has no authority to rule on Buffalo's Fourth Amendment

⁵ Section 103(b)(1) of the Act provides: "For the purpose of making any inspection or investigation under this Act, the Secretary or any authorized representative of the Secretary shall have a right of entry to, upon, or through any coal mine." Among other things, section 108 of the Act provides: "The Secretary may institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which a coal mine is located or in which the operator of such mine has his principal office, whenever such operator or his agent * * * (d) refuses to permit the inspection of the mine, or the investigation of an accident or occupational disease occurring in, or connected with, such mine * * *."

⁶ *Pittston Company v. Board of Mine Operations Appeals*, 460 F.2d 1189 (4th Cir. 1972).

claims and we affirm the Judge's ruling denying the motions to suppress.

II

NEPA Impact Question

As a general rule, we would concur with MESA's position that an issue not raised in the proceeding at the hearing level will not be entertained by the Board on appeal. However, in these cases, to determine a jurisdictional question, the Board ordered oral argument and specifically requested the parties to argue the question of the Board's authority to determine the impact, if any, NEPA and Executive Orders issued pursuant thereto may have on the validity of the substantive regulations pertaining to mandatory health and safety standards promulgated by the Secretary under the Act.

Buffalo argues that the failure of the Secretary to issue a detailed statement on the environmental impact of such regulations, which it alleges is required by NEPA, renders them invalid, and that this Board, under its delegation of authority from the Secretary, has jurisdiction to rule on this question.

On the other hand, MESA takes the position that this Board has never been delegated authority by the Secretary to determine the extent of applicability which NEPA may have on the promulgation of rules or regulations. Furthermore, MESA regards the invalidation of

any rule or regulation promulgated by the Secretary as beyond the jurisdiction of this Board.

None of the legal authorities cited by either party appears to conclusively resolve the issue, but we must hold with MESA. The jurisdiction of the Board is determined by its delegation from the Secretary as set forth in section 4.500 of Title 43, *Code of Federal Regulations* (43 CFR 4.500), which provides:

(a) The Board of Mine Operations Appeals, under the direction of a Board Chairman, is authorized to exercise, pursuant to regulations published in the *FEDERAL REGISTER*, the authority of the Secretary under the Federal Coal Mine Health and Safety Act of 1969 pertaining to:

(1) Applications for review of withdrawal orders; notices fixing a time for abatement of violations of mandatory health or safety standards; discharge or acts of discrimination for invoking rights under the Act, and entitlement of miners to compensation;

(2) Assessment of civil penalties for violation of mandatory health or safety standards or other provisions of the Act;

(3) Applications for temporary relief in appropriate cases;

(4) Petitions for modification of mandatory safety standards;

(5) Appeals from orders and decisions of hearing examiners; and

(6) All other appeals and review procedures cognizable by the Secretary under the Act.

* * * * *

(c) In the exercise of the foregoing functions the Board is authorized to cause investigations to be made, order hearings, and issue orders and notices as deemed appropriate to secure the just and prompt determination of all proceedings. Decisions of the Board on all matters within

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its jurisdiction shall be final for the Department.⁷

The foregoing delegation clearly limits the Board's authority entirely to the Secretary's adjudicatory functions of applying and interpreting the statutory provisions and regulations in the review of proceedings arising under the Act.

It is significant that the grant of this authority to the Board is made *pursuant to regulations* published in the *Federal Register*. It seems questionable to us that any administrative tribunal within an executive agency would be given the power to invalidate the very regulations from which its source of authority and jurisdiction is derived.

We have been delegated no rule-making authority whatever. The rulemaking for the Department has been reserved entirely to the Secretary.⁸ Therefore, he may have the power to declare his own regulations invalid, or a court may do so, but Buffalo has not provided us with the citation to any persuasive legal authority showing that we have any such power. Consequently, we hold that the power to declare

invalid the rules and regulations promulgated by the Secretary under the Act lies outside the scope of this Board's jurisdiction.

III

General Complaints

Buffalo makes several general complaints regarding the penalty assessments made by the Judge. The first of these is that the assessment structure established by the Department unfairly and unlawfully subjects an operator to higher penalties simply because he appeals the proposed assessments of the Assessment Officer in exercising his right to a public hearing.

Buffalo points out that the aggregate of all ten assessments involved here made by the Assessment Officer was \$475, while as a result of the public hearing, the Judge's aggregate assessment was \$2,900. This, it is contended, has the effect of deterring an operator from seeking formal adjudication by punishing him for daring to exercise a legal right. It is further charged that such result demonstrates vindictiveness, intimidation, and deprivation of due process and equal protection of the law.

MESA's response to this complaint is: that the machinery established for the assessment of penalties was entirely in accord with section 109 of the Act; that the informal proposed assessments made by the Assessment Officer were subject to rejection or payment by the

⁷ This delegation of authority is identical with the Secretary's delegation to the Board in Part 211, Department of the Interior, Departmental Manual, Chapter 13, Office of Hearings and Appeals, section .6, Board of Mine Operations Appeals (cited as 211 DM 13.6).

⁸ 211 DM 13.9 provides: ".9 *Federal Register Documents*. The Director is authorized to issue notices of proposed rule making and general notices pertaining to the functions assigned to the Office of Hearings and Appeals. Issuance of final rules for codification in the Code of Federal Regulations is reserved for Secretarial signature."

operator at its option and in no way affected its right to a public hearing; that a request by the operator for public hearing was not an appeal in any sense, but initiated instead a *de novo* proceeding before the Judge; that the Judge under the Act and the regulations was neither bound by nor did he consider the informal proposed assessments in arriving at his determination of the appropriate penalties to be paid; that the Judge gave due and careful consideration to his determinations; and that the facts of record support the conclusion that his decision was fair and reasonable.

Although we appreciate the frustrations expressed by Buffalo on this point, we find its argument fallacious, in that it is based on the false premise that the proceeding before the Judge was an appeal. MESA's analysis, that the proceeding before the Judge was *de novo* in nature, as distinguished from an appeal, is entirely correct and dispositive of this complaint. The regulations in effect at the time of the hearing so provided.⁹ This Board is bound to apply them and powerless to change them. We find no evidence in the record of vindictiveness against or intimidation of the operator by the Judge.

Buffalo also complains that the Judge seems to have placed some duty on the operator to supply information as to the effect any penalties imposed may have on the operator's ability to continue in business,

and, likewise, as to the appropriateness of such penalties to the size of the operator's business. Buffalo contends that the Act places no such burden on a mine operator and neither the Secretary nor an administrative tribunal has the authority to do so.

These are factors required to be considered under section 109(a) of the Act in fixing the amount of the penalty after it has been determined that a violation occurred. Therefore, as we indicated in *Hall Coal Company*, 1 IBMA 175, 179, 79 I.D. 668, 672, CCH Employment Safety and Health Guide par. 15,380 (1972), an operator should be given the opportunity to present information on the effect a mandatory penalty will have on its ability to continue in business; but, if it chooses not to do so, the Judge may indulge in a legal presumption that there will be no adverse effect, where such information is peculiarly within the possession of the operator. This is an entirely different proposition from Buffalo's contention that an unlawful burden is placed upon the operator. The operator is in no way compelled to furnish the information, but, if it chooses to assert that the penalty involved *will* adversely affect its ability to continue in business, it should have the opportunity, and should come forward to provide the necessary proof on this criterion.

We reaffirm the existence of the legal presumption expressed in the *Hall* decision, *supra*. When the Judge does utilize such presumption, however, he should make a spe-

⁹ 30 CFR 100.5(b), 37 F.R. 11460 (June 8, 1972).

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cific finding based thereon. The Judge erred in this respect in these proceedings. We believe that the record here supports such a finding.

The appropriateness of the penalty to the size of the business of the operator charged is another matter. MESA urges that a similar legal presumption should pertain with respect to this criterion. We do not agree. The size of the operator's business (the mine or mines involved) can be readily ascertained by MESA from reports which are or could be required under section 111 of the Act. Furthermore, a federal mine inspector should have little trouble preparing testimony as to the size of the business of the operator of any mine which he inspects. At least, he should be able to adduce enough facts to enable the Judge to determine whether such business fits into a "small," "medium," or "large" category as compared to the size of the business of other operators. This should be sufficient for appropriate consideration of this factor required by section 109(a)(1) of the Act.

A third general complaint by Buffalo is that the Judge erred in failing to expressly state the reason or basis for rejection of each of the proposed findings and conclusions submitted by Buffalo. It is contended that the language employed in the Order of the Judge's Decision, "that all proposed findings and conclusions inconsistent with this Decision . . . are Rejected," is insufficient compliance with that

part of 5 U.S.C. § 557(c) which provides:

The record shall show the ruling on each finding, conclusion, or exception presented * * *.

We see no reason to depart from the well-established case construction of this provision of the Administrative Procedure Act (APA). The specific requirement of 5 U.S.C. § 557(c), that the record shall show the ruling on each finding, conclusion, or exception presented, can be satisfied without a specific separate ruling on each proposed finding, conclusion, or exception; provided, the total decision sufficiently informs a party of the disposition of all its proposed findings and conclusions or exceptions.¹⁰ Consequently, we dismiss this general complaint insofar as it is premised on an erroneous interpretation of the APA as indicated above.

In the next part of this discussion, under *Complaints as to Specific Alleged Violations*, we shall determine whether the Judge's total decision sufficiently apprised Buffalo of the disposition of its proposed Findings and Conclusions regarding specific alleged violations. We note, however, that Buffalo's proposed findings and conclusions were confined to but seven of the ten

¹⁰ *North American Van Lines, Inc. v. United States*, 217 F.Supp. 837 (D.C., Ind., 1963); *NLRB v. Wichita Television Corp.*, 277 F.2d 579 (10th Cir. 1960), cert. denied, 364 U.S. 871; *NLRB v. Sharples Chemicals*, 209 F.2d 645 (6th Cir. 1954); *NLRB v. State Center Warehouse and Cold Storage Co.*, 193 F.2d 156 (9th Cir. 1951).

notices of violations involved in these appeals.¹¹

The last general complaint made by Buffalo deals with the sufficiency of the Judge's Findings of Fact, Conclusions of Law, and reasons therefor, as required by 5 U.S.C. § 557(c). Our disposition of this complaint will likewise be encompassed in the following discussion of the complaints pertaining to the specific notices of violation.

Complaints as to Specific Alleged Violations

At the outset, we note that the Judge failed to make express findings of fact in considering the amount of the ten assessments with respect to the following criteria: history of previous violations, size of the operator's business, and effect of the penalty on the operator's ability to continue in business. The duty then falls upon this Board to make such findings insofar as the record supplies the supporting evidence.

(1) Inasmuch as the record does not show any history of previous violations, we find that there was no history of previous violations to be considered with respect to the assessments involved in these cases.

(2) The record discloses that the No. 5 Mine, involved in IBMA 73-18, Docket No. HOPE 72-81-P, employed 40 men on the day shift (Tr.

179) and the No. 8 mine involved in the other cases, employed about 95 men and produced approximately 1,300 tons of coal per day (Tr. 613). It is also undisputed, and we take official notice, that Buffalo is a wholly owned subsidiary of the Pittston Coal Company, one of the largest coal producers in the United States. Therefore, we find that the size of the operator's business with respect to the mines here involved, is sufficient to justify the amounts of the civil penalties assessed.

(3) No specific evidence appearing in the record regarding the effect of any penalties on the operator's ability to continue in business, a legal presumption exists that none of the penalties here involved will adversely affect Buffalo's ability to so continue. Therefore, based upon that presumption, we find that none of the penalties here involved will adversely affect Buffalo's ability to continue in business.

We now turn to the review and disposition of the specific assessments and findings made for each of the ten alleged violations with respect to the fact of the violation, and the three remaining statutory criteria.

IBMA 73-18, Docket No. HOPE 72-81-P.

Notice 3 OS, February 26, 1971, charged Buffalo with the violation of 30 CFR 75.517, in that a "bare power wire was not insulated for a distance of about 700 feet along the No. 2 strip coal conveyor belt." The safety standard contained in the

¹¹ Buffalo made no specific proposed findings or conclusions, so far as we could ascertain from the record, with respect to the following three notices: 3 OS 2/26/71 and 3 OS 3/18/71 in Docket No. 72-81-P; and 2 OS 3/12/71 in Docket No. 72-65-P.

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subject regulation is identical with section 305(1) of the Act which provides:

Power wires and cables, except trolley wires, trolley feeder wires, and bare signal wires, shall be insulated adequately and fully protected.

The Judge's finding that this alleged violation occurred is supported by the evidence (Tr. 25). However, Buffalo's complaint is well taken as to the sufficiency of the Judge's findings with regard to the statutory criteria to be considered in fixing the amount of the penalty. No specific findings were made as to negligence, gravity and the good faith of the operator to achieve rapid compliance after notice of the violation.

The evidence adduced shows that the energized bare wire could have caused a mine fire by coming into contact with combustible material (Tr. 26, 42, 43) and could have caused an electrocution (Tr. 39); and that the exposure could have been prevented by installing insulated power wire in the first place or by insulating the bare wire at the time of installation (Tr. 26). In view of this evidence, we find that the violation was grave and that the operator did not exercise due care in the course of installing the wire and was, therefore, negligent.

The testimony of the government's witness, the mine inspector, was that the operator showed good faith in achieving rapid compliance after notice of violation and within the time fixed for abatement as extended (Tr. 26 and 27). However,

it appears that the Judge ignored this testimony (Decision 3, herein-after, Dec. 3) and though not expressly finding bad faith, impliedly so found by finding "that respondent could have insulated the wire within the time [originally] fixed." Our review indicates that the preponderance of the evidence clearly shows that the operator did exercise good faith in achieving rapid compliance, and we so find. Therefore, we conclude that the assessment of \$500 for this violation should be mitigated to \$400.

Notice No. 4 OS, 2/26/71, charges Buffalo with a violation of 30 CFR 75.1003 in that "Trolley wires at two track switches near the tippie headhouse were not guarded." The Judge found that: the violation occurred; that there was good faith compliance after notice; and that the violation was serious, but he didn't know how serious. He implied, but didn't expressly find, that the operator was negligent. The penalty assessed was \$100.

We find that Buffalo's contention that the notice failed to allege a violation of a mandatory safety standard and that the evidence adduced failed to establish a violation, is without merit.¹² However, we also find that the total evidence in the record establishes that Buffalo was not negligent and that the gravity

¹² See *Eastern Associated Coal Corporation*, 1 IBMA 233 at 235, 79 I.D. 723, 726, CCH Employment Safety and Health Guide par. 15,388 (1972). In that case the Board held as a general proposition that "where an alleged violation is sufficiently described to permit abatement, adequate notice of the condition is established."

of the violation was minimal. (Tr. 57-61.) Therefore, we conclude that this assessment should be reduced from \$100 to \$50.

Notice Nos. 5 OS, 2/26/71, 6 OS, 2/26/71, and 2 OS, 3/1/71, respectively charged Buffalo with the following violations:

30 CFR 75.1100-2(b) and (c). Firefighting equipment was inadequate because water cars or waterlines with appropriate outlet valves and fittings and 500 feet of firehose with proper fittings at strategic locations were not installed along the conveyor belt.

30 CFR 75.1101. Deluge-type sprays or foam generators, automatically actuated by a rise in temperature, or other no less effective means to control fires, were not installed at the main and secondary belt conveyor drives.

30 CFR 75.1714. Self-rescue devices adequate to protect the miners for one hour or longer were not provided for ten underground miners.

There is no dispute that the condition or practices described in the above notices existed at the time of the inspection; however, Buffalo contends that no violations properly should have been charged and no assessments made because the required equipment to abate was unavailable for purchase.

Our review of the evidence on this point indicates that Oscar Stiltner, the mine inspector who issued the above notices, testified with respect to Notice No. 5 OS, 2/26/71, that: (1) in his opinion the operator could have done nothing about the condition constituting the violation because "the material wasn't available"; (2) this firefighting

equipment, at that time, was not available for the industry as a whole — some were able to get some of it along gradually; and (3) that he had personal knowledge that this material was hard to get hold of at that particular time. (Tr. 70, 71, 72.) The inspector also testified that the outlet valves and firehose for the belt conveyor were not available for purchase at the time of the inspection (Tr. 90). The unavailability of this equipment was further corroborated by the testimony of Mario Varrassi, Safety Director for Buffalo. (Tr. 208.) The inspector similarly testified that the required equipment was not available with respect to Notice Nos. 6 OS, 2/26/71, (Tr. 99) and 2 OS, 3/1/71 (Tr. 108). On the face of the latter Notice of Violation. (Exhibit, P-14), the inspector wrote the following notation: "A Directive was issued May 11, 1970, at which time the material needed to comply was not available."

Despite the foregoing evidence, the Judge stated with respect to 5 OS, 2/26/71, at page 7 of his decision (Dec. 7), "I think the evidence indicates that Respondent either did not place its equipment orders early enough or did not diligently pursue the fulfillment of such orders." He found with respect to 6 OS, 2/26/71, that "appropriate deluge-type water sprays or foam generators were not present as required; * * * that Respondent could have taken corrective action before the notice of violation was issued"; (Dec. 9)

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* * *.¹³ With respect to 2 OS, 3/1/71, the Judge concluded that the Respondent (Buffalo) "has not met its burden of proving that it could not have had available to it at the time of the inspection the equipment and material required to avoid the violation." (Dec. 16.)

We must disagree with the Judge in his finding in light of this evidence. The total evidence in our view clearly supports a conclusion that the operator reasonably could not be expected to do a useless and futile thing—that is, place orders for equipment knowing it was not available. All of the evidence in this record, mostly supplied by the Government's own witness, clearly leads to a finding of fact that the equipment required for compliance with the safety standards cited in the three foregoing notices simply was not available for purchase by the operator. We find, therefore, that the equipment needed to abate these three violations was not available for purchase by the operator at the time the notices were issued.

Having made this finding, we must determine whether penalty assessments made for the subject notices should be permitted to stand.

Section 104(h)(1) of the Act, pertaining to unabatable conditions, provides as follows:

(1) If, upon any inspection of a coal mine, an authorized representative of the Secretary finds (A) that conditions

exists therein which have not yet resulted in an imminent danger, (B) that such conditions cannot be effectively abated through the use of existing technology, and (C) that reasonable assurance cannot be provided that the continuance of mining operations under such conditions will not result in an imminent danger, he shall determine the area throughout which such conditions exist, and thereupon issue a notice to the operator of the mine or his agent of such conditions, and shall file a copy thereof, incorporating his findings therein, with the Secretary and with the representative of the miners of such mine. Upon receipt of such copy, the Secretary shall cause such further investigation to be made as he deems appropriate, including an opportunity for the operator or a representative of the miners to present information relating to such notice.

(2) Upon the conclusion of such investigation and an opportunity for a public hearing upon request by any interested party, the Secretary shall make findings of fact, and shall by decision incorporating such findings therein, either cancel the notice issued under this subsection or issue an order requiring the operator of such mine to cause all persons in the area affected, except those persons referred to in subsection (d) of this section, to be withdrawn from, and be prohibited from entering, such area until the Secretary, after a public hearing affording all interested persons an opportunity to present their views, determines that such conditions have been abated. Any hearing under this paragraph shall be of record and shall be subject to section 554 of Title 5 * * *.

We construe the phrase, "cannot be effectively abated through the use of existing technology," to encompass circumstances where, at the time of the inspection, the operator cannot have available the equipment, materials, certified or qualified personnel, or scientific exper-

¹³ The Judge made this finding even though he recognized, on the same page of his Decision, that the operator's purchase manager had called a few companies and determined that the equipment was not available (Dec. 9).

tise required to comply with a mandatory health or safety standard. We believe it significant that nowhere in section 104(h) is the term "violation" used, but instead, the term, "conditions," is employed. It is likewise significant that in section 104(b) of the Act Congress used the term "violation" rather than "conditions" and, that section 109 of the Act requires the mandatory assessment of a civil penalty *only* where the Secretary finds that a "violation" occurred.

Reading sections 104(b), 104(h), and 109 together and giving effect to the language of all three, we conclude that Congress did not intend that a section 104(b) notice be issued or a civil penalty assessed where compliance with a mandatory health or safety standard is impossible due to unavailability of equipment, materials, or qualified technicians. Where an inspector observes a condition constituting a health or safety hazard and is aware that the "existing technology" required for abatement is unavailable, we think the better course would be to issue a section 104(h) notice *if* the inspector reasonably believes that continued mining operations *will* ripen into an imminent danger situation.

The ultimate consequence of an investigation triggered by a 104(h) notice would be the cancellation of the notice or the issuance of a withdrawal order. No penalty assessment would be involved. If, on the other hand, the inspector is aware of impossibility of abatement due to unavailability of "existing tech-

nology" and reasonably believes that continued mining operations *will not* ripen into an imminent danger situation, the issuance of either a section 104(b) or a section 104(h) notice would be inappropriate.

If the inspector should issue a section 104(b) notice of violation under the mistaken belief that equipment is available, and it later proves not to have been, then MESA or the Judge should vacate the notice. Of course, in all cases, irrespective of the unavailability of equipment, material, or technical personnel, if the inspector believes that the condition or practice constitutes an *existing* imminent danger, he must issue a section 104(a) order of withdrawal¹⁴ to protect

¹⁴ This construction of the statute finds support in the opinion of the United States District Court for the Western District of Virginia at Abingdon, rendered in the course of issuing a temporary restraining order in the case of *Ratliff, et al v. Hickel, et al*, Civil Action No. 70-C-50-A, where Judge H. E. Widener, Jr. said:

"When imminent danger is not involved, the defendants are restrained from enforcing Title III of said Public Law 91-173 in any manner, other than in accordance with Section 104 (h)(1) of said Public Law, when defendants charge violations which may be corrected by the use of equipment which is not available for purchase, the court being of opinion that equipment which is not available for purchase cannot effectively be used to abate a condition through the use of existing technology. The defendants are further restrained from enforcing Title III of said Public Law in any manner other than in accordance with Section 104(h)(1) of said Public Law, when defendants charge violations which may not be corrected because of the unavailability of certified, registered or qualified personnel or required materials. However, this subparagraph of this order shall in no way prevent the defendants from seeking any remedy provided under said Public Law by way of fine, penalty, or other tools, including closure of mines, in the event, in the opinion of the defendants, the condition complained of is causing or resulting in imminent danger."

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the health and safety of the miners exposed to such danger.

Applying the foregoing statutory construction to the facts here, we hold that the three notices above discussed should have been vacated and the penalties assessed thereon set aside. At the time of the issuance of the notices, the inspector knew that the equipment and materials required for abatement were unavailable to the operator. He found no imminent danger present, and it is fair to infer he was reasonably satisfied that no imminent danger was likely to develop. This inference is based upon the answer of the inspector in response to the Judge's question as to whether there were any means to control fires at the time of the inspection. He replied, "Yes, sir, rock dust was available and fire extinguishers were available." (Tr. 98.) Therefore, the inspector should have issued no notice at all. Neither a 104(b) notice nor a 104(h) notice was appropriate. He might simply have informed the operator, however, that compliance would be expected after the equipment became available, and, that failure to do so could result in the issuance of a 104(b) notice.

With respect to the question of burden of proof which was raised in connection with the alleged violations, we are in accord with Buffalo's position *on that point* as expressed in its brief at pp. 14 and 15, as follows:

Essentially the state of the evidence here is that the Government's own witness has absolved Buffalo of liability for

these civil penalties * * *. While the burden of proving unavailability of equipment or materials may be on the operator so long as there is an inference of availability, when—as here—the only evidence of record rebuts that inference, there is nothing to be proven or disproven [by the operator].

Notice No. 3 OS, 3/8/71, was based on a violation of 30 CFR 75-1403-1(b) and 30 CFR 1403-9.¹⁵ It specified the following:

Shelter holes were not provided along the truck haulage roads at intervals of not more than 105 feet as required in a notice to provide Safeguards (No. 3) issued February 26, 1971.

The objection made by Buffalo to this notice of violation and assessment of \$100 is the failure of the Judge to make findings of fact. The determination that the violation occurred is not disputed; however, the Judge did not make specific findings on gravity, negligence, and good faith.

The only evidence on this violation was the testimony of the inspector. He testified that the violation was not serious (Tr. 130, 135), that it could have been prevented by the operator prior to notice (Tr. 131), and that the operator made a

¹⁵ These two regulations arise from section 314(b) of the Act, 30 U.S.C. 874(b), which provides: "Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided." 30 CFR 75-1403-1(b) requires an inspector to give an operator written notice to provide a safeguard where needed for safe man trips and transportation of men and to issue a notice of violation if the operator fails to provide the safeguard within the time fixed. 30 CFR 75-1403-9 specifies the criteria for shelter holes for guidance to the inspectors in issuing notices to provide safeguards.

good faith effort to achieve rapid compliance after receiving the notice of violation (Tr. 131). We find from the foregoing evidence that the gravity of this violation was minimal, that the operator was negligent but that it demonstrated good faith in achieving rapid compliance after receiving the notice of violation. We find no reason, however, to change the assessment of \$100 made by the Judge for this violation.

Appeal No. IBMA, 73-22, Docket No. HOPE 72-65-P

Notice No. 2 OS, 3/12/71, charges a violation of 30 CFR 75.507 in that "the direct-current rectifier was located in the return airway in No. 2 section."¹⁶

It is not disputed that the rectifier was located in the return airway. However, the mine superintendent explained that the mine had been ventilated with one fan and during the night of March 11, 1971, a second fan was installed to provide more air. This caused the rectifier to be in return air for the day of March 12. The operator moved the rectifier into intake air on March 13, a Saturday. The superintendent pointed out that a fan had been constructed for some time but when it was ready it could not be put in the circuit until the miners

were out of the mine. (Tr. 574, 575, 577-581.)

Commenting on this explanation, the Judge in his decision at p. 3 (Dec. 3) stated:

I think the explanation makes sense; and it is to be noted that although the inspector fixed a 10-day period for abatement, Respondent corrected the condition within one day. This is a situation where the evidence appears to justify the temporary violation. But, as I read the Act, mitigating circumstances can be reflected only in the amount of the penalty to be assessed.

Buffalo argues that the Judge's words, "the evidence appears to justify the temporary violation," amounted to a finding that the facts were more than mitigating and absolved Buffalo of all liability for a penalty assessment.

We disagree. It seems to us that although the Judge failed to expressly find the operator not negligent under the circumstances here, his comments as a whole indicate simply a belief that the operator was not negligent.

The inspector testified that the violation was serious because of the possibility of methane being present in the return airway. (Tr. 509.) But this was offset by his further testimony: that no methane was present during the inspection and to his knowledge none had ever been found in that mine (Tr. 517); that no coal float dust was in the return airway; and that he did not see any other hazard (Tr. 518).

The Judge made findings that the violation charged in fact occurred

¹⁶ 30 CFR 75.507 restates the statutory safety standard set forth in section 305(d) of the Act (30 U.S.C. § 865(d)) which provides: "All power-connection points, except where permissible power connection units are used, out by the last open crosscut shall be in intake air."

and that the operator exercised diligence in abating the condition—noting that the correction was made within one day after receipt of the notice of violation. He made no express ultimate findings as to negligence, gravity, or good faith compliance.

Therefore, the Board finds from the evidence adduced that the operator was not negligent, that the violation was not grave, and that the operator demonstrated good faith in achieving rapid compliance after notice. We conclude that these mitigating findings justify a reduction of the assessment from \$50 to \$10.

Notice No. 4 OS, 3/16/71, charged Buffalo with the following violation of 30 CFR 75.604:

A permanent splice in the trailing cable on No. 2 shuttle car in No. 1 section was not effectively sealed and insulated to exclude moisture; and flame resistant materials were not used.

The principal issue here is whether the Judge erred by rejecting the following finding proposed by Buffalo:

The evidence fails to establish the violation charged, that a permanent splice in the trailing cable of a shuttle car was not properly made because the evidence showed that the splice in question met all the requirements of an unprohibited temporary splice.

We hold that he did not.

The Act and the regulations provide among other things that a permanent splice, when made, shall be effectively insulated and sealed so as to exclude moisture, and vulcanized or otherwise treated with suitable materials to provide flame-resist-

ant qualities and good bonding to the outer jacket.¹⁷ The Act and the regulations also provide that one temporary splice may be made in any trailing cable; that such trailing cable may only be used for the next 24-hour period; and that temporary splices in trailing cables shall be made in a workmanlike manner and shall be mechanically strong and well-insulated.¹⁸

The inspector explained in his testimony (Tr. 529–530, 534) that the main difference between a permanent splice and a temporary splice is that a permanent splice involves the application of heat or vulcanization and is made with flame-resistant material that seals itself, while a temporary splice is made without using heat or any such flame-resistant material. He testified also that the splice involved in this notice was a permanent splice because it had been vulcanized with a flame-resistant material, but was defective. (Tr. 526, 527.) He further testified: “It wasn’t made as a temporary splice. It was made as a permanent splice.” (Tr. 531.)

We concur with the Judge that “a temporary splice is not a so-called lesser-included condition of a permanent splice,” (Dec. 4) and with his finding that the splice in question was a faulty permanent splice. (Dec. 5.)

The inspector testified in substance that the violation was serious

¹⁷ See section 306(e) of the Act (30 U.S.C. § 866(e)) and 30 CFR 75–604.

¹⁸ See section 306(d) of the Act (30 U.S.C. § 866(d)) and 30 CFR 75.603.

because the faulty splice could cause a fire or an electrical shock, and that the condition constituting the violation could have been prevented by doing a proper repair job on the splice in the first place, and, by simply examining the cable, the condition could have been discovered prior to the inspection. (Tr. 523-525.) The inspector opined (Tr. 527) that the operator made a good faith effort to achieve rapid compliance after he received the Notice of Violation. He said, "it was corrected immediately."

The Judge again made no express findings on negligence and gravity, and, at p. 4 of his Decision, made the additional startling statement: "In those circumstances" (referring to the evidence on gravity and negligence) "the opinion of the inspector that Respondent made a good faith effort to achieve compliance once the notice issued, is rather meaningless."

Not only did the Judge err by failing to make the necessary findings on negligence and gravity, but erred if, by the above-quoted statement, he intended to ignore consideration of the separate, good-faith factor as required by section 109 of the Act. Therefore, the Board finds from the evidence that the operator was negligent in attempting to make the permanent splice; the violation was grave; and the operator demonstrated good faith in achieving rapid compliance after notice of the violation. Since the Judge apparently failed to consider the good faith criterion in fixing the assess-

ment at \$200, we conclude that mitigation of the assessment to \$150 would be appropriate for this violation.

Notice No. 1 OS, 3/18/71, cites Buffalo for the following violation:

30 CFR 75.1100-2. The waterlines along the belt conveyors were not equipped with firehose outlets with valves at 300-foot intervals, and 500 feet of firehose with fittings suitable for connection with each belt conveyor waterline system were not stored at strategic locations along the belt conveyors, and firehose was not available on the working sections.

There is no issue here whether the equipment in question was supplied; it was not. The sole issue is whether Buffalo was properly subjected to penalty assessments for failing to have equipment which the Government's own evidence unequivocally established could not be obtained.

At the hearing, under direct examination of counsel for MESA, the inspector testified (Tr. 557) as follows:

Q. Do you have an opinion as to whether or not the operator could have prevented this situation from occurring in the mine?

A. At this particular time, the operator couldn't comply with this section.

EXAMINER SWEENEY: Why do you say, "at this particular time"? This is 1971.

THE WITNESS: The material was not available.

EXAMINER SWEENEY: Fire hose was not available?

THE WITNESS: Yes, sir, fire hose.

EXAMINER SWEENEY: Couplings?

THE WITNESS: Yes, sir, because all of the companies had it on order, and they just got it in pieces.

September 20, 1973

EXAMINER SWEENEY: What was the alternate method that they were using?

THE WITNESS: You mean, instead?

EXAMINER SWEENEY: Yes.

THE WITNESS: They were using fire extinguishers and rock dust. Actually, before the effective date of these regulations, that was acceptable.

The inspector further testified (Tr. 560-561) as follows:

BY MR. PIERCE:

Q. Mr. Stiltner, I believe you stated earlier that Mr. Morgan * * *—had told you that its fire-fighting equipment was difficult to obtain. Now, other than Mr. Morgan's statement that it was difficult to obtain, and in light of your testimony now that you felt that the operator made a good faith effort to achieve rapid compliance, since it was hard to obtain—

A. Yes, sir.

Q. —did you have any personal knowledge, other than Mr. Morgan's statement, that this material was difficult to obtain at this time?

A. Yes, sir.

Q. What would that be?

A. All the mines I visited or inspected were having the same difficulties in getting this fire fighting equipment.

Despite the foregoing evidence, which was the sole evidence adduced in the record pertaining to the unavailability of the equipment, the Judge on page 8 of his decision, stated, among other things, as follows:

The condition cited in the notice here is a serious one. The burden of proving unavailability lies with the Respondent.

I find * * * that there is no apparent reason why Respondent could not have taken corrective action before the notice of violation issued;

I conclude that the Respondent had the duty to provide adequate fire fighting

equipment in its 8-B mine; that Respondent has not met its burden of proving that it could not have had available to it at the time of the inspection the equipment and material required to avoid the violation; * * *

The above statements by the Judge are entirely without factual support from the evidence in the record and resulted, as we view it, in an erroneous assessment of \$250. This particular violation involves the same issue and nearly and identical evidentiary situation as in Notices 5 OS, 2/26/71; 6 OS, 2/26/71, and 2 OS, 3/1/71, discussed above, and, therefore, deserves the same treatment. The Judge implies by his disposition of this notice that unless the operator proves unavailability of equipment, the defense of unavailability is not available. This is error as a matter of law. The matter of putting the burden of proving unavailability of equipment upon the operator applies only when there is an inference of availability established by the Government's evidence. It is not important which party proves a given fact material to resolving a factual issue. Regardless of which party supplies the proof in the record, once a fact is established, either party is entitled to rely upon it. Therefore, the Board finds that the equipment and materials needed to abate this violation were not available for purchase by the operator at the time the notice was issued, and we conclude that this notice of violation should be vacated and the penalty assessed thereon set aside.

*Appeal No. IBMA 73-23, Docket
No. HOPE 72-150-P*

Notice No. 2 EGR, 6/10/71,
charges Buffalo with a violation of
section 75.703 "of the Act" in that:

The frames of the direct current machines on the No. 2 section were not provided with proper ground in that the ground wires were not connected. (Exh. P-1.)¹⁹

This notice gave the operator one hour to abate the condition described. On the same date, the inspector issued a notice that the operator had abated the condition within the time fixed. (Exh. P-2.) Although the notice of violation makes reference to section 75.703 "of the Act," it is obvious that the inspector meant to refer to the "Code of Federal Regulations" and the operator did not object to this clerical error. The operator does contend, however, that MESA failed to sustain its burden of proof here because its proof did not negate the other possible permissible grounding methods enumerated in sections 75.703-1 through 75.703-4 of 30 CFR.

We quite agree with the Judge that the record shows no dispute of the facts regarding the condition or practice observed by the inspector and cited in the subject notice of violation. (Tr. 614-617 and 635.)

¹⁹ 30 CFR 75.703, the basis for this cited violation is identical with section 307(b) of the Act (30 U.S.C. § 867(b)) which provides: "The frames of all offtrack direct-current machines and the enclosures of related detached components shall be effectively grounded, or otherwise maintained at no less safe voltages, by methods approved by an authorized representative of the Secretary."

We also affirm his ruling that MESA does not have to offer evidence eliminating every type of effective grounding in order to prove that in the instant case the unconnected wires created a lack of effective frame grounding. (Dec. 3.)

The Judge assessed a penalty of \$200 for this evaluation amounting to \$50 for each of the four machines involved. He found the violation to be serious and that the operator demonstrated good faith in achieving rapid compliance after notice. We find that the operator was negligent based on the unrefuted testimony of the inspector that all that had to be done to avoid the violation was to look at the wires and see that they were properly connected before energizing the machines. (Tr. 618.)

We hold that the Judge correctly determined that a violation occurred and that his assessment of \$200 is reasonable, and that his conclusions are supported by the evidence.²⁰

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43

²⁰ Before concluding this decision, we note that the three cases consolidated for this decision were three of at least eight separate civil penalty proceedings assigned eight separate docket numbers. All eight were incorporated into the same transcript of nearly 750 pages. Yet, in only one of his written decisions did the Judge make transcript citations to the evidence discussed. It would be helpful to the Board in expediting review of initial decisions if the Administrative Law Judges would be careful to make appropriate citations to the transcript when referring to the evidence upon which their decisions are based.

CFR 4.1(4)), IT IS HEREBY ORDERED that:

1. The rulings of the Administrative Law Judge denying motions of Buffalo to suppress the evidence, obtained from mine inspections made without search warrants or the express consent of the operator, ARE AFFIRMED;

2. With respect to Appeal No. IBMA 73-18 (Docket No. HOPE 72-81-P):

(a) The assessment of \$500 resulting from Notice of Violation No. 3 OS, 2/26/71, IS MODIFIED to \$400;

(b) The amount of \$100, resulting from Notice of Violation No. 4 OS, 2/26/71, IS MODIFIED to \$50;

(c) The assessments resulting from Notices of Violation numbered 5 OS, 2/26/71, 6 OS, 2/26/71, and 2 OS, 3/1/71, ARE SET ASIDE and such notices ARE VACATED; and

(d) The assessment of \$100 resulting from Notice of Violation No. 3 OS, 3/18/71, IS AFFIRMED;

3. With respect to Appeal No.

IBMA 73-22, Docket No. HOPE 72-65-P:

(a) The assessment of \$50 resulting from Notice of Violation No. 2 OS, 3/12/71, IS MODIFIED to \$10;

(b) The assessment of \$200, resulting from Notice of Violation No. 4 OS, 3/16/71, IS MODIFIED to \$150; and

(c) The assessment, resulting from Notice of Violation No. 1 OS, 3/18/71, IS SET ASIDE and such notice IS VACATED;

4. With respect to Appeal No. IBMA 73-23, Docket No. HOPE 72-150-P:

The assessment of \$200, resulting from Notice of Violation No. 2 EGR, 6/10/71, IS AFFIRMED; and that

5. Buffalo Mining Company pay the penalties finally hereby assessed in the total amount of \$910 on or before thirty (30) days from the date of this decision.

DAVID DOANE, *Member.*

I CONCUR.

C. E. ROGERS, JR., *Chairman.*

LOCAL UNION 1520, DISTRICT 2, V. RUSHTON MINING COMPANY

February 8, 1973

**UNITED MINE WORKERS OF
AMERICA, LOCAL UNION 1520,
DISTRICT 2**

v.

RUSHTON MINING COMPANY*

2 IBMA 39

Decided *February 8, 1973*

Appeal pursuant to the Federal Coal Mine Health and Safety Act of 1969¹ by Rushton Mining Company (hereinafter Rushton) from a decision of Richard C. Steffey, Administrative Law Judge, Docket No. PITT 73-224, ordering it to pay eight miners for the four hours of the second shift during which they were idled after issuance of a withdrawal order. The decision, issued on December 19, 1972, was appealed on January 4, 1973.

Remanded for hearing.

**Federal Coal Mine Health and Safety
Act of 1969: Hearings: Waiver**

Where there are disputed issues of material fact, an Administrative Law Judge, may not grant summary decision unless there is an express waiver of hearing. 43 CFR 4.588.

APPEARANCES: Benjamin Novak, Esquire, Richard M. Sharp, Esquire, for appellant, Rushton Mining Company; Charles L. Widman, Esquire, for appellee, United Mine Workers of America, Local Union 1520, District 2.

**INTERIOR BOARD OF MINE
OPERATIONS APPEALS**

*Not in Chronological Order.

¹P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

**MEMORANDUM OPINION
AND ORDER**

The Board has before it the appeal by Rushton in the above-entitled proceeding, together with a petition by the Bureau of Mines for leave to participate as amicus curiae, and a motion by the United Mine Workers of America (hereinafter UMWA) for extension of time to file appellee's brief originally due on February 1, 1973.

The Board has reviewed the record of this proceeding in light of the procedural question raised on appeal. Rushton contends that it was denied a hearing by the arbitrary action of the Judge in issuing a decision based solely upon the petition and the answer of Rushton.

Rushton alleges a denial of due process where no waiver of hearing is filed, no motion for summary decision is filed by either party, and the Judge renders a decision on the pleadings without notice, hearing or opportunity to present evidence and argument. Rushton relies upon the provisions of section 4.588—Waiver of Evidentiary Presentation—of the Rules and Regulations² and section 556(d) of the Administrative Procedure Act.³ We find also applicable section 554(c)(1) of the Administrative Procedure Act.⁴

It is elementary administrative law that a denial of the opportunity for hearing in adjudicatory

² 43 CFR 4.588.

³ 5 U.S.C. § 556(d).

⁴ 5 U.S.C. § 554(c)(1).

proceedings is a denial of due process. Although a hearing need not always encompass oral presentation, certain elements are mandatory. Among these is the right to present evidence and argument. The record before us indicates that Rushton was not afforded such opportunity. It here appears to the contrary that the Judge rendered a decision based solely upon the allegations of the petition of UMWA and the answer of Rushton. The Judge found that "Neither party has given any indication that a hearing is desired."⁵ We find this statement to be contrary to the intent of the law and regulations. Section 4.588(b) of the rules specifically provides as follows:

Parties entitled to an evidentiary hearing may waive such right in writing, but unless all entitled parties file timely waivers, a hearing will be conducted. Such waivers must be unequivocal and request the Examiner [Administrative Law Judge] to decide the matter at issue on the pleadings and written record of the case including any stipulation the parties might enter.

In our review we are unable to find any waiver of hearing by either party. The decision that no hearing would be held appears to be solely and arbitrarily that of the Judge who based his ruling on the belief that neither party had specifically indicated that a hearing was desired.

In light of the specific provisions of section 4.588 we must conclude that since neither party waived hearing, it was error, and a denial of due process, for the Judge to conclude that no hearing was required

or desired. We hold, therefore, that the proceeding must be remanded for hearing.

Since the proceeding must be remanded for hearing, no consideration is herein given to the substantive argument of Rushton on appeal. Furthermore, in view of our determination on the procedural issue, we see no need to delay a remand and, therefore, deny the request of UMWA for an extension of time to file its brief to this Board. For the same reason, the request of the Bureau of Mines to appear as *amicus curiae* is also denied. The Bureau will have full opportunity before the Judge to avail itself of the provisions of section 4.513 of the rules, and to present its views at such hearing.

ORDER

WHEREFORE, in light of the foregoing and pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED:

1. That the decision of the Administrative Law Judge IS VACATED and the case IS REMANDED for hearing in accordance with this opinion;
2. That the motion of the Bureau of Mines to participate as *amicus curiae* before the Board in this case IS DENIED; and
3. That the motion of counsel for the United Mine Workers of America for an extension of time in which to file a brief IS DENIED.

C. E. ROGERS, JR., *Chairman.*

DAVID DOANE, *Member.*

⁵ Decision of Administrative Law Judge at 2 (December 19, 1972).

LOCAL UNION 1520, DISTRICT 2 v. RUSHTON MINING COMPANY

March 1, 1973

**UNITED MINE WORKERS OF
AMERICA, LOCAL UNION 1520,
DISTRICT 2**

v.

RUSHTON MINING COMPANY*

2 IBMA 55 Decided *March 1, 1973*

Application by Rushton Mining Company (hereinafter Rushton) for reconsideration of the Board's Memorandum Opinion and Order issued February 8, 1973, pursuant to the Federal Coal Mine Health and Safety Act of 1969¹ which remanded the above-entitled matter for a hearing. Rushton's initial appeal had been taken from a decision of Richard C. Steffey, Administrative Law Judge, Docket No. PITT 73-224.

Denied.

**Federal Coal Mine Health and Safety
Act of 1969: Reconsideration**

After remanding a case because there was no waiver of hearing, the Board will not grant reconsideration to decide if the Administrative Law Judge should be disqualified.

APPEARANCES, Benjamin Novak, Esquire, Richard M. Sharp, Esquire, on behalf of Rushton Mining Company; and Charles L. Widman, Esquire, on behalf of United Mine Workers of America, Local Union 1520, District 2.

**INTERIOR BOARD OF MINE
OPERATIONS APPEALS
MEMORANDUM OPINION
AND ORDER**

*Not in Chronological Order.

¹ P.L. 91-173, 88 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

The Board has before it an application filed February 20, 1973, by Rushton for reconsideration of its Order of February 8, 1973, remanding the proceeding for hearing and an opposition thereto filed February 23, 1973, by United Mine Workers of America (hereinafter UMWA).

In support of its application Rushton alleges: (1) that its right to an impartial hearing would be jeopardized if the case is remanded to the same Administrative Law Judge, and (2) that it is prejudiced by the Board's action denying the request of UMWA for extension of time to file its brief on appeal. UMWA in opposition maintains that nothing in the record indicates that the Administrative Law Judge is in any way prejudiced and that there is no justification or basis for the Board to require UMWA to submit a brief.

The Board's remand order was based upon a procedural lack of due process and right to hearing and did not go to the substantive merits of the appeal. Therefore, we do not find that Rushton is in any way prejudiced by reason of the fact that the Board denied UMWA an extension of time to file its brief. The argument of Rushton in this regard is not persuasive. We note that Rushton itself raised the question of due process in its appeal and requested "the right to be heard before decision is rendered." Since the Board has merely remanded this proceeding for hearing we fail to

comprehend Rushton's allegation of prejudice on the part of the Judge. In any event, the question of disqualification of a hearing officer is not properly before this Board.²

ORDER

WHEREFORE, in light of the foregoing and pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED:

That the application for reconsideration IS DENIED.

C. E. ROGERS, JR., *Chairman.*

DAVID DOANE, *Member.*

PITTSBURGH COAL COMPANY

2 IBMA 277

Decided *October 5, 1973*

Appeal by Pittsburgh Coal Company from a decision dated June 29, 1973, in Docket No. PITT 72-161, by Administrative Law Judge George H. Painter, whereby he granted the Bureau of Mines (MESA) motion to dismiss an application for order of withdrawal No. 1 GFM.

Affirmed.

Federal Coal Mine Health and Safety Act of 1969: Closure Orders: Imminent Danger

Presence of 1.5 volume per centum or more of methane supports issuance of section 104(a) Withdrawal Order.

APPEARANCES: Craig R. McKay, Esquire, Pittsburgh, Pennsylvania, Attorney for appellant, Pittsburgh Coal

Company; William H. O'Riordan, Trial Attorney for appellee, Mining Enforcement and Safety Administration (MESA), formerly U.S. Bureau of Mines.

INTERIOR BOARD OF MINE OPERATIONS APPEALS DECISION

On this appeal, appellant contended, inter alia, that: "The Administrative Law Judge erred in holding as a matter of law that a concentration exceeding 1.5 volume per centum of methane as defined in section 303(h) (2) of the Act¹ *per se* warrants a finding of 'imminent danger.'"²

In addition to the reasons given by the Administrative Law Judge in his decision the Board notes that in the section-by-section analysis of section 204(h) (2), subsequently enacted as section 303(h) (2) of the Federal Coal Mine Health and Safety Act of 1969, the report of the Senate Committee³ states as follows:

* * * If the air contains 1.5 percent of methane, withdrawal of the miners by the operator or *inspector, if he is present*, is required * * * Long experience has shown that the methane, when present is dangerous. The explosion range is between 5 and 15 percent. Once it reaches

¹ Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

² Oral argument was requested by appellant; however, due to the nature of the question presented and the thoroughness of the briefs filed by the parties, the Board has decided oral argument would serve no useful purpose.

³ Legislative History, Federal Coal Mine Health and Safety Act, Committee on Education and Labor, House of Representatives, 91st Cong., 2d Sess., 58-59 (1970).

1.5 percent it can accumulate rapidly. Thus, action must be taken promptly before it reaches 1.5 percent. (Italics added.)

In our view this expression of Congressional intent is sufficient to override the arguments advanced by the appellant and to sustain the Judge's decision on this point.

The Board's action in affirming the Administrative Law Judge renders it unnecessary, with one exception, to discuss the other contentions advanced by appellant in his brief. This remaining contention is whether the Administrative Law Judge erred in denying counsel for appellant the opportunity to cross-examine the inspector regarding his understanding of the term "imminent danger." Our review of the transcript reveals that the right to cross-examine was afforded appellant and that he availed himself of such right.

Having reviewed the record and considered the brief of the appellant and the response thereto by MESA and in light of the above, the Board concludes that the findings of fact, conclusion of Law, and decision of the Administrative Law Judge should be affirmed.⁴

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS ORDERED that the decision of the Adminis-

trative Law Judge IS HEREBY AFFIRMED.

C. E. ROGERS, JR., *Chairman.*

DAVID DOANE, *Member.*

2 IBMA 281

June 29, 1973

DECISION

Statement of the Case

This proceeding was initiated by Pittsburgh Coal Company to review the above order of withdrawal pursuant to section 105 of the Federal Coal Mine Health and Safety Act, 30 U.S.C. § 801 *et seq.* (1969).

The hearings on this matter took place at the Federal Building, Pittsburgh, Pennsylvania, on April 26, 1973. Petitioner was represented by Craig R. McKay, Esquire, of Pittsburgh, Pennsylvania. Respondent was represented by William H. O'Riordan, Esquire, Office of the Solicitor, Department of the Interior.

Issue

Is it within the authority of an inspector to issue a 104(a) withdrawal order upon discovery of a methane pocket exceeding the statutory maximum as prescribed in section 303(h) (2) of the Act?

Summary of Evidence

During a preshift inspection in which Gerald F. Moody, an Inspector for the Bureau of Mines, accompanied Paul Ringer, a section foreman for petitioner, the existence of a pocket of methane gas was detected at approximately 8:30 a.m. Both the

⁴ The Judge's decision follows at 2 IBMA 281, p. 656.

inspector and the foreman, the only witnesses in this proceeding, testified that the air contained in excess of 1.5 volume per centum of methane. A bottle sample taken by Inspector Moody contained approximately 1.82 percent of methane. Inspector Moody, according to his testimony, thereupon placed a danger board at the loading head and orally issued a 104(a) withdrawal order affecting the entire 9 west face section of the mine. He remained at the site until approximately 10:30 a.m. when the methane level had been reduced to below the one percent level. At that time the sign was removed and the situation was described as abated. Paul Ringer had spent most of this time at the site directing his men in abating the condition. Of the nine man crew two were acting as 104(d) personnel. The remaining men were apparently performing general maintenance work in the vicinity of the 9 west face section that was subject to the withdrawal order.

Discussion

Under section 104(a) an inspector "shall issue" a withdrawal order to clear designated mine areas if upon inspection a condition of imminent danger is found to exist. In similar language the latter part of section 303(h)(2) provides for a withdrawal of miners, though it does not express itself in terms of imminent danger. By requiring a withdrawal of miners upon the detection of a 1.5 volume per centum the Act seems

to be recognizing a condition of imminent danger.

As defined in section 3(j) of the Act "imminent danger includes a condition which could reasonably be expected to cause death or serious physical harm before each condition * * * can be abated." If Congress has determined by statute that a 1.5 volume per centum reading is sufficient to require the drastic action of withdrawal, then it must be because the situation was viewed as one of imminent danger. Congress in 303(h)(2) has intentionally left no room for doubt or discretion in what it viewed as an imminent danger. Considering the nature of the gas, the perilous conditions created by it, and insignificant quantum of energy necessary to cause an ignition—there is a sufficient basis to characterize a 1.5 percent concentration as one of imminent danger.

The seriousness with which Congress viewed the methane problem can be seen by the 303(h)(1) requirement of an initial preshift examination for the gas to be repeated at twenty minute intervals thereafter. The deadly history of the gas in the last thirty years bears ample witness to the intent of Congress to reduce this major cause of death.¹ It can reasonably be in-

¹"Since January 1941, 1,142 miners have been killed and 965 have been injured in 688 underground coal mine ignitions or explosions, which have been reported to the Bureau of Mines. These ignitions and explosions have been among the major causes of death and injury to coal miners." Legislative History, Federal Coal Mine Health and Safety Act, Committee on Education and Labor, House of Representatives, 91st Cong., 2d Sess., 25 (1970).

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ferred that the withdrawal requirement of 303(h)(2) presumes the existence of a condition of imminent danger. This being the case, the issuance of a 104(a) order would appear to be the appropriate method of notifying an operator of what is required of him under the Act, where he has not upon his own initiative withdrawn the miners from the area affected by the methane.

Findings of Fact

1. Gerald F. Moody, Jr., is a qualified inspector in the field of mine health and safety.

2. During a routine preshift mine inspection pursuant to 303(h)(1) a volume of approximately 1.82 percent of methane gas was detected.

3. Inspector Moody, immediately at approximately 8:30 a.m. issued an oral 104(a) order affecting the entire 9 west face section of the mine, and at the same time placed a danger board at the loading belt.

4. By 10:30 a.m. the condition had been fully abated and the withdrawal order terminated.

Conclusion of Law

1. A concentration exceeding 1.5 volume per centum of methane as defined by 303(h)(2) warranted a finding of imminent danger as defined in 3(j).

2. The existence of this imminent danger under 303(h)(2) properly led to the issuance of a 104(a) withdrawal order under this Act.

ORDER

The Bureau of Mines' Motion to Dismiss the review of Order of Withdrawal No. 1 GFM, March 8, 1972, is hereby granted.

GEORGE H. PAINTER,
Administrative Law Judge.

ESTATE OF JENNIE ELSIE ELI,
JOHNSON, WILSON, BEAVERT
(UNALLOTTED YAKIMA NO.
124-U3431)

2 IBIA 74

Decided *October 8, 1973*

Appeal from an Administrative Law Judge's order denying petition for rehearing.

Reversed and remanded.

370.0 Indian Probate: Rehearing: Generally

A rehearing will be granted when the record does not support the Judge's findings.

381.0 Indian Probate: Secretary's Authority: Generally

The Secretary of the Interior has by express terms reserved to himself the power to waive and make exceptions to his regulations affecting Indian matters.

APPEARANCES: Cameron K. Hopkins, Esq. (Porter & Hopkins), for appellants, Thomas J. Eli, Edith Eli Watlamatt and Eli Culp, Jr.; and Frederick L. Nolan, Esq. (MacDonald, Hoague & Bayless) for appellee, Columbus Beavert.

*INTERIOR BOARD OF IN-
DIAN APPEALS
OPINION BY MR. WILSON*

This matter comes before the Board on appeal from an Administrative Law Judge's denial of appellants' petition for rehearing concerning a claim allowed against the estate for labor and services.

Jennie Elsie Eli Johnson Wilson Beavert, hereinafter referred to as decedent, died intestate April 29, 1971. A hearing to determine heirs was held on January 21, 1972, by Administrative Law Judge Robert C. Snashall. Thereafter, on February 28, 1972, an order determining heirs was duly made and entered by the Judge.

The Judge, among other things, in said order allowed Columbus Beavert, hereinafter referred to as Appellee, \$14,600 on a purported claim for labor and services.

On April 17, 1972, Lauretta Olney Goudy, a Yakima tribal member but not an attorney at law, filed on behalf of the three heirs a letter with the Judge wherein a request was made for a rehearing on the matter of appellee's claim.

The Judge on May 10, 1972, advised Mrs. Goudy that he could not consider her letter of April 17, 1972, as a petition for rehearing for the reason that it did not meet the requirements of 43 CFR 4.241(a) (1972) and because she was not authorized by law to act in a representative capacity in the matter. See 43 CFR 1.3 (1972).

In the same letter Mrs. Goudy was further advised that the payment allowed to appellee was more in the nature of a compromise rather than a claim in a strict sense of 43 CFR § 4.250 and that the requirements of that section would not be applicable.

The letter of May 10, 1972, appears to have led to some confusion as to whether or not it was intended as a denial of a petition for rehearing.

In any event, the Judge on May 26, 1972, extended for 30 days the period for filing the petition for rehearing. Pursuant thereto, Lauretta Olney Goudy again on behalf of the "legal heirs" on July 6, 1972, filed a petition for rehearing with the Judge.

The petition for rehearing dated July 6, 1972, was denied by the Judge on July 24, 1972, in the following language:

At the outset it should be noted the purported petition wholly fails to meet the substantive requirements of applicable regulations (43 CFR 4.241); fails to identify the "legal heirs" in whose behalf it is purported to represent; and, the petitioner, Lauretta Olney Goudy, does not appear to be either an attorney at law nor a party in interest and therefore has no standing before this forum.

However, be that as it may, the purported petition insofar as I am able to understand its purported substantive provisions is an argument of the facts and appears to contain nothing of material import bearing upon the correctness of the Order Determining Heirs. Most of what petition alleges already is a matter of record in the proceedings either by documentation or as it appears in the transcript of testimony. The remaining

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allegations could have no bearing on the outcome of the proceedings. Accordingly, there is no indication that the result might be altered by granting a rehearing at this time.

Thereafter, two separate notices of appeal were timely filed; one by Tommy J. Eli and Edith Eli Watlamatt, and one by Eli Culps, Jr., through their counsel, Cameron J. Hopkins.

The appeals are predicated on identical grounds and are as follows:

(1) That the record contains no evidence or testimony which would substantiate charges of money awarded to Columbus Beavert for labor and services. (2) Further, there is no testimony which would establish a contract for services, either expressed or implied. (3) If such a contract were found, the law of the State of Washington (RCW 4.16.080) limits it, to three-year claims upon contracts expressed or implied which are not in writing, wherein the claim of Columbus Beavert was for eight (8) years. (4) 43 CFR 4.250(c) recognizes state law barring claims. (5) 43 CFR 4.250(d) requires clear and convincing evidence of promised compensation before claims for care and service will be allowed. (6) The record is clearly lacking sufficient evidence of any nature to substantiate Columbus Beavert's claim.

Notwithstanding the fact that the Judge designates the appellee's claim in his order of February 20, 1972, as a claim for labor and services, it is not possible to determine from the record just what labor was performed and the type of services provided. The transcript makes brief and vague mention of appellee's claim in the following manner:

Q. Do I understand that you intend to make some kind of claim against the estate?

A. Well, yes.

Q. O.K., on the basis of what—some services or something you performed in behalf of Jennie?

A. Yes, it concerned some bills that we have that's not on record here.

Q. Well, in other words, there are claims that could be placed against her estate for bills incurred by the two of you?

A. Yes. (Tr. 3.)

The transcript makes further mention of the claim in question as follows:

Q. Now, one last thing. Are you making any claim whatsoever against this estate on your own behalf other than what you mentioned about the claims? I need to know what contention you are making since I think you are aware that since you are not technically, legally married to her you wouldn't be an heir in the estate under State of Washington law. Now, I understand that you provided certain services and performed certain things in connection with her property. If that's the case it would be conceivable that you would have a claim against her estate for services. But I have to know what the extent of that was and what the value of it was. Let's go off the record.

RECORD SUSPENDED

RECORD RESUMED

A. The way I was advised it would be \$5.00 a day for the 8 years that we spent together?

Q. How much?

A. \$5.00 a day.

Q. \$5.00 a day for services performed on her behalf?

A. Yes.

Q. Now that's each day, every day, for eight years?

A. Yes.

Q. Now, are there any offsets against that such as that did she provide any room and board for you or anything else or is this figure including that?

A. Yes.

Q. In other words, you feel that you have a net claim against her estate for \$5.00 per day?

A. Yes.

Q. Did she ever talk to you about her estate or about whether you had an interest in it?

A. Oh, yes. We never had any secrets from each other. We talked about improvements or land and that and what was hers was mine as far as we were together.

Q. O.K., I have no further questions at this moment. (Tr. 6, 7.)

We note here the testimony elicited from Edith Watlamatt in response to certain questions propounded by the Judge regarding the claim (Tr. 8).

After due consideration, we find the record, as presently constituted, is incomplete and does not substantiate the appellee's claim. In view of the foregoing finding, there appears to be no necessity or compelling reason at this time to consider or discuss the appellants' contentions, referred to *supra*.

The appellee in his memorandum of points and authorities in answer to appellants' notice of appeal and memorandum, among other things, contends:

The Board should dismiss appellants' appeal as being improperly raised or in the alternative, should sustain the decision of the Administrative Law Judge.

We are not in agreement with either of the appellee's contentions.

In the first instance, the purpose

of any administrative tribunal is to secure a just result regardless of procedural technicalities—*Estate of Lucille Mathilda Callous Leg Ireland*, 1 IBIA 67, 78 I.D. 66 (1971). Moreover, the Secretary has by express terms reserved to himself the power to waive and make exceptions to his regulations affecting Indian matters. See *Estates of William Bigheart, Jr.*, IA-T-21 (Supp.) (September 4, 1969); *Edward Leon Petsemoie*, IA-T-10 (Supp.) (May 29, 1968); *Estate of Joseph Cannon*, IA-T-19 (Supp.) (March 7, 1969).

Secondly, the appellee, in the alternative urges that the decision of the Administrative Law Judge should be sustained.

This contention we find without merit and cannot be sustained in view of the fact that the claim as found by this Board, is clearly not supported or substantiated by the evidence.

In conclusion we find, in the interest of all parties, that the matter, insofar as the appellee's claim is concerned, should be reversed and remanded for further proceedings and for the issuance of appropriate findings and a decision thereon.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, IT IS HEREBY ORDERED:

1. That the Administrative Law Judge's order of July 24, 1972, denying petition to rehear IS REVERSED.

October 11, 1973

2. That the matter IS RE-MANDED to the Administrative Law Judge for the specific purpose, after the parties in interest have been duly notified, of conducting further proceedings on the validity of appellee's claim and for the issuance of appropriate findings and decision based upon the evidence presented during said proceedings.

ALEXANDER H. WILSON, *Member*.

I CONCUR:

MITCHELL J. SABAGH, *Member*.

CORPORATION OF THE PRESIDING BISHOP, CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS (BEE HIVE MINE)

2 IBMA 285

Decided *October 11, 1973*

Appeal by the Mining Enforcement and Safety Administration (MESA) from a decision by an Administrative Law Judge issued June 21, 1973, assessing civil penalties in the amount of six thousand three hundred seventy-six dollars (\$6,376), pursuant to section 109 of the Federal Coal Mine Health and Safety Act of 1969 in Docket Nos. DENV 73-2-P and DENV 73-41-P.

Affirmed.

Federal Coal Mine Health and Safety Act of 1969: Penalties: Criteria

It is error not to consider, as part of the history of previous violations in fixing the amount of a civil penalty under section 109 of the Act, violations for

which the operator has agreed to pay, under protest, the amounts assessed by the Assessment Officer.

APPEARANCES: William H. Woodland, Esq., Attorney for appellant, Mining Enforcement and Safety Administration; F. Briton McConkie, Esq., Salt Lake City, Utah, Attorney for appellee, Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints.

**OPINION BY MR. ROGERS
INTERIOR BOARD OF MINE
OPERATIONS APPEALS**

Background Statement

On February 13 and 14, 1973, a hearing was held pursuant to 43 CFR 4.540 on a petition for assessment of civil penalty filed by MESA. At the hearing MESA did not present evidence on 38 specified alleged violations for the reason that the operator had agreed to pay, under protest, the amounts previously assessed by the Assessment Officer. In the decision the Judge refused to consider any of these 38 alleged violations as part of the operator's history of previous violations and made the following statement:

I am not going to consider as a part of the history any of the alleged violations involved in the operator's agreement to pay, under protest, the amounts previously assessed by the Assessment Officer. I do not believe that the alleged violations should properly be considered as a part of the operator's history of prior violations even under the ruling of the Board of Mine Operations Appeals in its

decision of September 29, 1972, in *The Valley Camp Coal Company*, 1 IBMA 196, 79 I.D. 625.

It is this statement and the refusal of the Judge to consider these 38 alleged violations as past history that gave rise to this appeal by MESA.

Issue on Appeal

Whether the Administrative Law Judge erred in concluding that certain alleged violations in a penalty proceeding, for which the operator agreed to pay, under protest, the amounts assessed by the Assessment Officer, should not be considered as a part of the operator's history of previous violations in determining the amount of penalty assessments for the litigated alleged violations in the same proceeding.

Discussion

It is MESA's position that section 109(a) (1) of the Act requires the Secretary to consider, in determining the amount of a civil penalty, the operator's history of previous violations; that payment by an operator of assessments or compromise assessments is a tacit admission that the violation occurred; that payment is more than an offer of compromise and that, therefore, such violations must be considered as part of the operator's history of previous violations. Respondent, Corporation of the Presiding Bishop, Church of Jesus Christ of Latter-Day Saints, argues that the decision of the Judge is not in conflict with our decision in *The Valley*

Camp Coal Company, 1 IBMA 196, 79 I.D. 625 (1972), CCH Employment Safety and Health Guide, par. 15,385 (1973), and that the fault of the operator must first be shown before a history of previous violations can be considered.

This Board held in *Valley Camp*, *supra*, that where penalties assessed have been paid, the associated Notices of Violation are admissible as evidence of a history of previous violations and that a penalty properly may be assessed for a violation not caused by the fault of the operator. Our decision in *Valley Camp*, *supra*, is dispositive of the issue here.

We agree with MESA and hold that the Judge is required to consider whatever history of previous violations is before him in fixing the amount of a penalty assessment under section 109 of the Act, and that violations, for which the operator agrees to pay the informal assessments of the Department, even though under protest, are a part of that history and to be considered. However, what weight or effect that history may have on the amount fixed is another matter.

The Board, in its review, has considered the alleged violations involved in the operator's agreement to pay, and finds that their weight and effect as related to the history of previous violations, under the circumstances of this case, to be of such insignificance that we see no merit in changing the total assessment fixed by the Administrative Law Judge. We note, among other things, that

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the respondent is no longer the operator of the mine and that any addition to the amount fixed by the Judge would, therefore, have no deterrent effect on future violations.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that:

1. the DECISION IS AFFIRMED, AS MODIFIED with respect to the consideration of the history of previous violations; and

2. the ORDER of assessment in the total amount of \$6,376 IS AFFIRMED, and shall be paid on or before thirty days from the date hereof.

C. E. ROGERS, Jr., *Chairman.*

I CONCUR:

DAVID DOANE, *Member.*

ESTATE OF SOPHIE IRON BEAVER,
FISHERMAN (CHEYENNE
RIVER NO. 2335, DECEASED)

2 IBIA 83

Decided October 16, 1973

Petition to reopen estate.

Denied.

375.0 Indian Probate: Reopening:
Generally

In the absence of compelling reasons and failure to allege the existence of a manifest injustice or how it might be cor-

rected if reopening were permitted, a petition to reopen will be denied when it is filed more than three years after the final determination of heirs was made.

375.1 Indian Probate: Reopening:
Waiver of Time Limitation

Petition to reopen filed more than three years after the final determination will not be granted unless there is compelling proof that the delay was not occasioned by the lack of diligence on the part of one who is petitioning.

APPEARANCES: James L. Claymore,
Superintendent, Cheyenne River
Agency, for Joseph Fisherman,
Deceased.

INTERIOR BOARD OF INDIAN APPEALS OPINION BY MR. WILSON

This matter comes before the Board on a petition to reopen filed by James L. Claymore, Superintendent, Cheyenne River Agency, Eagle Butte, South Dakota.

The record indicates a hearing was held and concluded in this estate at Eagle Butte, South Dakota, on July 19, 1966. Thereafter, on November 23, 1966, an order determining heirs was entered in the matter by an Administrative Law Judge.

In the absence of any interim petitions filed pursuant to 25 CFR 15.18(a) (superseded by 43 CFR 4.242(a)), the estate herein was closed at the expiration of the three-year period on November 23, 1969.

The Superintendent, in support of the petition sets forth the following reason:

Joseph Fisherman, C.R.—3619, born 5/6/15, son of a predeceased son was omitted from the estate and should be included.

The petition further indicates the purpose of the petition is to correct the erroneous determination of heirs.

It is noted from collateral data that Joseph Fisherman died May 29, 1972, thereby explaining why the petition is filed by the Superintendent.

There is nothing in the record or in the petition indicating that Joseph Fisherman, during his lifetime, was under a disability due to minority or lack of competence which would have prevented him from objecting to the findings of November 23, 1966.

Moreover, the failure of Joseph Fisherman, up until the time of his death on May 29, 1972, to pursue any right or claim he may have had in the estate during the three-year period required by 43 CFR 4.242(a) (formerly 25 CFR 15.18(a)), clearly indicates lack of diligence on his part.

The Superintendent has not shown the existence of a manifest injustice resulting from the omission of the said Joseph Fisherman as an heir in the estate.

The Department of the Interior over the years has adopted a strict policy of refusing to entertain appeals not timely filed. *Estate of*

Ralyen or Rabyea Voorhees, 1 IBIA 62 (1971). The same policy is applicable to petitions for reopening filed beyond the three-year limitation provided in the regulations, *Estate of George Minkey*, 1 IBIA 1 (1970).

The Board is not unmindful of the power of the Secretary to waive and make exception to these regulations in Indian probate matters.¹ However, such authority will be exercised only in cases where the most compelling reasons are present. *Estate of Charles Ellis*, IA-1242 (April 14, 1966); *Estate of George Minkey*, *supra*.

Reopening, in excess of the three-year limitation, will be permitted only where it appears that the party seeking relief has not been dilatory in seeking his remedy. *Estate of Alvin Hudson*, IA-P-17 (May 29, 1969); *Estate of George Squawlie (Squally)*, IA-1231 (April 5, 1966); *Estate of George Minkey*, *supra*.

The petition of the Superintendent clearly falls short of meeting the standards set forth in the cases cited above and accordingly, the petition must be denied.

NOW, THEREFORE, pursuant to the authority delegated to the Board of Indian Appeals, 211 D.M. 13.5; F.R. 12081, the petition to reopen filed herein under date of July 25, 1972, by the Superintendent, Cheyenne River Agency, IS HEREBY DENIED and the order

¹ 25 CFR 1.2.

determining heirs dated November 23, 1966, IS AFFIRMED.

This decision is final for the Department.

ALEXANDER H. WILSON, *Member*.

I CONCUR:

MITCHELL J. SABAGH, *Member*.

APPEAL OF PHL CONTRACTORS

IBCA-874-11-70

Decided October 23, 1973

Contract No. 14-20-0500-2865, Potato Hill Road-Yakima Indian Reservation, Bureau of Indian Affairs.

Sustained.

Contracts: Construction and Operation: Changed Conditions (Differing Site Conditions)—Contracts: Construction and Operation: Differing Site Conditions (Changed Conditions)—Contracts: Construction and Operation: Drawings and Specifications—Contracts: Construction and Operation: Estimated Quantities

Quantities of rock encountered by a road construction contractor materially in excess of what should have been anticipated from the contract plans together with the absence of suitable material in situ or from borrow for finishing the road to satisfy Government requirements is found to constitute a Category 1 Changed Condition where the contract documents taken as a whole and construed in the light of the evidence of record indicated that conditions would be more favorable than those actually experienced in construction.

Contracts: Construction and Operation: Changes and Extras—Con-

tracts: Construction and Operation: Drawings and Specifications

Where the contract obligated the Government to provide borrow sources where sufficient quantities of suitable materials were not available from roadway excavation as planned and where the Government did not comply with this obligation when the condition was called to its attention, the Board holds that directives which required the contractor to "scrounge around" for borrow and to rearrange the available material constituted a constructive change.

APPEARANCES: Mr. Norman B. Kobin, Attorney at Law, Kobin & Meyer, Portland, Oregon, for the appellant, Mr. David E. Lofgren, Department Counsel, Portland, Oregon, for the Government.

INTERIOR BOARD OF CONTRACT APPEALS OPINION BY MR. NISSEN

This timely appeal asserts a category one changed conditions claim. In the alternative, appellant alleges that the design, having contemplated conditions not encountered, was defective or inaccurate. In a closely related claim appellant asserts entitlement to additional compensation because of changes in the manner and method of grading due to the contracting officer's failure to designate a borrow source. The parties have stipulated that the Board decide only the issue of entitlement (Tr. 5).

FINDINGS OF FACT

The contract¹ awarded on January 3, 1968, called for grading and

¹ Exhibit 1. References to exhibits are to the appeal file unless otherwise indicated.

special subbase on Potato Hill Road, which is located partly on the Yakima Indian Reservation, State of Washington, for an estimated price of \$494,636.10. The project is in the Cascade Mountains about 60 miles west of Toppenish, Washington, in Yakima and Skamania Counties. The work involved the construction and application of special subbase to 8.727 miles of roadway and the finishing and application of special subbase to an additional 9.229 miles of previously constructed roadbed. A major portion of the application of special subbase was deleted from the contract in November of 1968 (Change Order No. 1, Exh. 2) because the designated borrow source proved to be unsuitable. The construction portion of the project (8.727 miles) was broken into three sections: west, station 0+00 to 113+46.59; middle, station 5+25 to 228+53.41 and east, station 159+70.18 to 283+75.

The contract included Standard Form 23-A (June 1964 Edition) with additions not pertinent here and Standard Specifications for Construction of Roads and Bridges on Federal Highway Projects (FP-61, January 1961) except that Division I was deleted and Division I, General Requirements of the Specifications substituted therefor. Although Article 9.2, Scope of Payments, of the General Requirements makes it clear that payment was to be made only for actual quantities of work performed, the deletion referred to had the effect of elimi-

nating from the invitation and resulting contract Article 2.2 of Division I of FP-61, which provides, *inter alia*, that quantities appearing in the bid schedule are only approximate.

The requirements of Division II, Construction Details, of FP-61 were in some instances deleted, added to and revised by the Special Provisions. Section 102, Roadway and Borrow Excavation *as amended* by the Special Provisions provided in pertinent part:

SECTION 102—ROADWAY AND BORROW EXCAVATION

This section applies with the following revisions and additions:

Description

Article 102-1.1 *Scope*. * * * The contractor will be required, in his earthwork grading operations, to substantially complete the new road to within 3/10 of 1 foot of finished subgrade design as he proceeds with the construction along the project. Unless otherwise authorized in writing by the contracting officer, grading operations shall proceed in a continuing sequence from station to station and not more than 3 miles of excavation work shall be opened for improvement at any one time. Grading work in isolated project areas, outside of the 3-mile section under improvement, will not be permitted unless authorized in writing by the contracting officer.

102-1.2 *Borrow*. Where sufficient quantities of suitable materials are not available from roadway excavation as planned, additional materials shall be excavated from borrow pits indicated on the plans or approved by the engineer. No material from borrow pits shall be placed in the

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embankment in any balance section until it has been determined that all roadway excavation *within the balance section* can be utilized in the embankment as planned. In lieu of borrow the engineer may require that additional roadway excavation be obtained by widening cuts or flattening cut slopes. If no final slope finishing has been performed and the widening of flattening (sic) will not necessitate a change in the contractor's method of operation, no adjustment in compensation will be made other than payment at the contract price for the excavated material as provided in article 4.2. (*Italics supplied.*)

Article 102-1.3 *Classification*: * * * All excavation under this section, including borrow, shall be considered unclassified excavation regardless of the nature of the material excavated.

CONSTRUCTION

102.3-2 *Utilization of Excavated Materials*. All suitable material removed from the excavation shall be used as far as practicable in the formation of the embankment, subgrade, shoulders, slopes, bedding, and backfill for structures, and for other purposes shown on the plans or as directed.

Large pieces of coarse rock and boulders encountered in cut sections during pioneering and rough grading operations shall be utilized in the formation of embankments. Where feasible, where there are predominant areas of large rock in cut sections, such material shall be placed in the lower sections of the embankment thereby conserving the more suitable excavation material for top portion of the subgrade. All surplus large rock and boulders shall be buried or disposed of as directed by the contracting officer. In no case shall surplus rock be piled above the finished road subgrade elevation.

Where so required, coarse rock encountered in the excavation shall be conserved and used as directed for constructing the sides of embankments adjacent to or parallel with any stream or used where

such material may serve as protection against slope or channel erosion.

During the progress of the excavation, material encountered in cuts and deemed suitable for placing in the roadbed or for topping or for road finishing shall be saved and utilized for those purposes as directed by the engineer.

All surplus excavated material and all waste material, including rocks brought to the surface by scarifying, shall be disposed of by uniform widening of embankments or flattening slopes, or by depositing the material in such other places and for such other purposes as the engineer may direct. The contractor shall not borrow nor waste material without approval by the engineer.

PAYMENT

Article 102-5.1 * * * Excavation from approved borrow pits shall be considered for payment at the unit bid price under pay item 102(1), Unclassified Excavation.

* * * * *

SECTION 105—OVERHAUL

This section applies with the following revisions:

* * * * *

Article 105-1.1 *Delete entire paragraph and substitute the following*: It is anticipated that the hauling of excavated materials (Item 102(1)) in excess of 1,000 feet will be nominal. Therefore, no separate payment will be made for overhaul. However, the contractor may be required to haul outside of the designed balance section in order to utilize all *suitable* material from the excavation. End-hauling of material from one balance section into another will be limited to 1,000 feet. (*Italics supplied.*)

* * * * *

SECTION 106—EMBANKMENT

* * * * *

106-3.4 Placing Embankment

Embankment material shall be placed in successive horizontal layers, except that on hillsides of solid rock it may be placed in a single layer to the minimum

elevation permitting the operation of placing and compacting equipment, the rock first having been serrated as directed by the engineer to assure satisfactory stability of the embankment. Hillsides other than solid rock shall be excavated inward from the embankment toe a sufficient distance to permit operation of placing and compacting equipment.

Material containing by volume less than 25 percent of rock larger than 6 inches in greatest diameter shall be spread in successive layers not exceeding 8 inches in thickness, loose measurement.

Material containing more than 25 percent of rock larger than 6 inches in greatest dimension shall be placed in layers of sufficient depth to contain the maximum size rock present in the material; provided, however, that in no case shall the thickness of layers before compaction exceed 24 inches.

Even though the thickness of layers is limited as provided above, the placing of individual rocks and boulders greater than 24 inches in diameter will be permitted provided that when placed, they do not exceed 48 inches in height and provided they are carefully distributed with the interstices filled with finer material to form a dense and compact mass.

Each layer, before starting the next, shall be leveled and smoothed by means of power-driven graders, bulldozers, or other suitable equipment. Hauling and spreading equipment shall be operated over the full width of each layer.

The top portion of embankments and the backfill of undercut areas shall be of selected borrow for topping, special subbase material, or material selected and conserved for that purpose from roadway and borrow excavation. No stones that would fail to pass a 3-inch square opening shall be left within 4 inches of the bottom of the lowest base course.

In the case of rock fills the placement of rock material in layers, as prescribed, will be waived and such material may be

placed by the end dumping method or other methods satisfactory to the contracting officer, provided, however, that the rock must be prevented from escaping beyond the embankment slope stakes.

106-3.5 Compaction. Delete the text of this article and substitute the following: No rolling is required on regular embankment work up to 12 inches below finished subgrade elevation except that hauling and spreading equipment shall be operated over the full width of each layer placed. The top 12 inches of the road subgrade and the 6 inches of special subbase, grading A, may be ordered rolled as specified in FP-61, Section 109, and as modified below. The contracting officer reserves the right to specify the particular type of roller to be used.

BACKGROUND

This project was previously advertised and bids opened on August 11, 1966 (memo, dated August 12, 1966, Exh. 33; letter dated September 20, 1966, Exh. 34). The five bids received ranged from \$564,773 to \$1,107,642. The cited memorandum states that the disparity between the high and low bids stems from bidders' appraisals of the amount of solid rock that will be encountered and that "Sufficient information has not been obtained for a reliable estimate of the amount of solid rock excavation that will be involved on the project." The memorandum recommended that all bids be rejected and the project redesigned after tests and exploratory work are performed to ascertain the extent of rock excavation that would be entailed in construction of the project. While there is some indication that bids were considered to be too

high,² the real reason for the rejection was that the bid prices were higher than funds available for the project (Tr. 706, 707).

The design engineer and project inspector was Mr. Jack Bilderback.³ Although he was responsible for the initial design as well as the design incorporated into the second solicitation, his single visit to the project site was prior to the issuance of the second solicitation (Tr. 90, 99, 101, 449). This visit was sometime after the opening of the first bids on August 11, 1966, and prior to September 9, 1966. The visit, made in the company of Mr. Dave Erickson⁴ and Mr. C.V. Sluyter,⁵ was for the specific purpose of exploring the project for rock and occupied one day (Tr. 451, 606, 608). Although Mr. Bilderback testified that the only site investigation data that existed prior to the first solicitation were some notes of visual observations by the Bureau of Public Roads survey crew, who had established the preliminary or P-line (Tr. 80, 96), and other testimony by Mr. Bilderback was to the effect that he personally made the design computations (Tr. 548, 549), all design

computations on the project were made by the Federal Highway Administration on an IBM 1401 Computer (par. 35, Findings of Fact). See also Tr. 623.

The western section of the project was heavily timbered (Tr. 132), while the eastern section had previously been cleared by the Bureau of Indian Affairs (Tr. 474). Mr. Bilderback commenced his site investigation from the west end (Tr. 91, 451). He observed rock in the cut on the existing road approximately 800 to 1,000 feet from the beginning (station 0+00) of the instant project.⁶ Although he observed rock in a creek at station 14 in the western section (see photo No. 2, Exh. 46), he didn't think the rock in the creek would show up in the earth work for the road (Tr. 92, 616). He walked the western section through station 113 and other than a few small loose boulders didn't see anything that he considered would indicate rock.

He observed rock in a small stream at station five in the middle section and a large rock knob on the left hand side at around station 16 or 18. They (Bilderback & Erickson) were picked up by Mr. Sluyter at approximately station 100 to 120 (middle section) and they drove over Potato Hill Road, which had rock sticking out all over, to a small lake at about station 160 (Tr. 93). There was a large rock knob near

² Tr. 77, 700, 701. Mr. Charles Walton, area engineer for the Federal Highway Administration, who reviewed and approved both solicitations, did not believe that all bids on the first solicitation were too high (Tr. 490).

³ Mr. Bilderback also prepared the findings of fact (Tr. 72). While we recognize that the contracting officer must rely on subordinates for information, combining the functions of design, inspection, and preparation of findings in the same individual has little to commend it.

⁴ Assistant Area Road Engineer at that time, later Area Road Engineer.

⁵ Area Road Engineer at the time.

⁶ On cross-examination Mr. Bilderback admitted that the existence of rock in this cut did not cause him to expect rock from station 0+00 to 14+00, west end (Tr. 616).

where they parked the car which the P-line went over. They walked back toward station 120 and observed exposed rock. They returned to the car and proceeded toward the eastern section. There were large, bare rock-knobs in the area where the east and middle sections joined (Tr. 94). Mr. Bilderback's total analysis was that the east side was predominantly rock, that the middle section was approximately one-half rock and that there was very little, if any, rock on the west end (Tr. 89, 94). He indicated that Mr. Powell⁷ concurred with his projections as to rock (Tr. 95). He testified that he took these manifestations of rock into consideration in designing the project (Tr. 463). Rock influences the estimate of how much material is going to make a fill and also affects the nature of the cut slopes.⁸

After he had returned from his site visit and had calculated one set of balances⁹ Mr. Bilderback was in receipt of a report, dated September 9, 1966, from the Superintendent of the Yakima Agency concerning examinations and explorations of cut sections on Project YIR 50(4),

⁷ Mr. Collins Powell, Bureau engineer, was the contracting officer's authorized representative for the project (letter, dated April 9, 1968, Exh. 27).

⁸ Tr. 611. Although the plans (p. 2) indicate that a slope of $\frac{1}{4}$ to 1 is for solid rock, Mr. Bilderback acknowledged that there were no slopes on the entire project with such a ratio and that the project was designed with a majority of the slopes on a ratio of $1\frac{1}{2}$ to 1 which is for a mixture of common and rock (Tr. 612-615). See also Slope Stake Notes (App's Exh. 16).

⁹ Balances refer to the expected amount of excavation as compared to the amount of material to be placed in embankment within a given section of roadway (Tr. 385).

Potato Hill Road, referred to herein as the "soils report" (Exh. 37). The report reflects the existence of solid rock at station 18+00, middle section, and that rock was on the surface at station 29+00. At 15 stations in the middle section, beginning at station 32+50 and continuing to station 163+00, test holes were dug with a backhoe. The holes indicated rock at depths varying from 0.3 feet to 5.7 feet below the surface. The report states practically all of the cut sections from station 163+00 [eastward] to the end of the project showed rock and boulders on the surface. The terrain from station 0+00 to 113+46 [west section] made it impractical to explore with a backhoe. The existence of this report was not made known to prospective bidders (Tr. 81, 607). Mr. Bilderback testified that he did not consider the information in the report would be helpful to bidders because the report merely confirmed what he found in the field.¹⁰

As previously noted all excavation on this project was unclassified. Mr. Bilderback's stated reason for unclassifying the job was that it was difficult to measure rock separately from earth on this type of a project and that he did not want to be haggling with the contractor as to what constituted rock (Tr. 88, 642, 643). The differences between the initial and revised design were that excavation quantities were reduced ap-

¹⁰ Tr. 607. Mr. Erickson (note 4, *supra*) testified that the Bureau did not generally include soils information in its solicitations where the job was unclassified and bidders were expected to make their own determinations of the material to be encountered (Tr. 709, 710).

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proximately one-third by eliminating the requirement for widened ditches and by changing the alignment, shrinkage factors were adjusted in line with rock excavation anticipated to be encountered and the requirement for crushed rock was eliminated, special subbase being substituted therefor (Tr. 99, 100, 450, 451; letter to Bureau of Public Roads, dated March 30, 1967, Exh. 35). The estimated price for excavation was increased by \$.35 to \$1 (Tr. 451). This estimate was considered reasonable by Mr. Walton of the Federal Highway Administration, who had made a "windshield survey" of the east section of the project sometime prior to the initial solicitation.¹¹ He admitted, however, that their estimate would have been higher if they had realized the extreme difficulty on the east side (Tr. 496).

PHL SITE INVESTIGATION AND BID

PHL contractors is a joint venture consisting of Washington Construction Company and Hill-Lyshaug, Inc. whose principals were Frank Propes and Tor Lyshaug, respectively. Mr. Propes had previously had a contract with the Bureau, referred to as "Moclips," which was located approximately three miles from the western terminus of the instant project (Tr. 106,

433, 434, 452). The firm had not bid on the first solicitation on the Potato Hill Road project (Tr. 107).

The prebid site investigation was made on or about October 24, 1967 by Mr. Lyshaug accompanied by Mr. Jill Adams (Tr. 158, 160, 309). Mr. Adams was a superintendent for PHL with extensive experience in construction (Tr. 109, 120, 189). They approached the project from the east and drove over the existing road which generally followed the P-line in this area. They concluded that the eastern section was predominantly rock, that a portion of the material could be ripped,¹² and that drilling and shooting would be required in the deeper cuts (Tr. 161, 162). Mr. Lyshaug based his conclusion that some of the material could be ripped on the fact that fracture planes were visible in the rock (Tr. 304). He acknowledged that if rock was visible on the surface it was a logical conclusion that it extended below the surface (Tr. 303).

They parked the car at approximately station 200 to 205, middle section, and followed a trail that went past a lower lake and up into the hills until they ran into heavy snow. They were off of the P-line and were looking for the Case 1 borrow source (Tr. 312), which is to the south of the right-of-way at the eastern end of the middle section. They returned to the car and followed an old Indian road off of the

¹¹ Tr. 481, 482, 489, 491, 495. He characterized this project as a "scratch job," that is one having shallow cuts and fills and stated "They are very difficult jobs to work because essentially you're trying to put 3 foot of rock into a 2-foot fill." (Tr. 485.)

¹² That it is reasonable to expect that at least some basalt material can be ripped was confirmed by Mr. Walton (Tr. 483) and by the Caterpillar Performance Handbook (Tr. 99).

right-of-way up a steep hill to the top of the project¹³ and again parked the car near a pond at approximately station 159 middle section (Tr. 164, 307). There was a general knoll next to the pond which contained fractured rock at the surface (Tr. 308). They did not see anything which in Mr. Lyshaug's opinion could be characterized as a rock outcrop. Mr. Lyshaug and Mr. Adams then walked along the P-line in an easterly direction for some 2,000 feet (Tr. 165). This area was covered with forest growth and had an occasional outcrop of rock showing.

Upon returning in the direction of the car, they observed test holes at stations 160 and 142 (Tr. 166, 169). These test holes showed common dirt or dirt with an occasional fracture overrock.¹⁴ The test holes served to confirm Mr. Lyshaug's impression that the material in the area was common with rock fractures. (Tr. 202, 741). However, he acknowledged that he made no at-

tempt to probe or further investigate the test holes (Tr. 310, 311).

Mr. Lyshaug and Mr. Adams proceeded westward to the boundary of the Indian reservation at approximately station 120 middle section (Tr. 314). They did not see any rock outcrops. Returning to the car they drove over the road which leads to the point where the Cascade Crest Trail intersects the right-of-way at approximately station 95 middle section (Tr. 170). They parked the car and walked westward to approximately station 58, observing a test hole at station 66+50 (Tr. 172; photo, p. 10; App's Exh. 4). The test hole showed dirt with an occasional rock fracture. Returning to the car, they proceeded on a trail around Potato Hill (located to the north of the right-of-way at approximately station 120) to Midway Guard Station (Tr. 172) which is located slightly over one mile north of the right-of-way. Driving south on the Trout Lake Road, referred to as the road to Crystal Lake by Mr. Lyshaug, they reentered the right-of-way at station 5+52.¹⁵ They walked eastward to approximately station 50, observing that the area required medium to light clearing and that there were a few scattered boulders on the surface which Mr. Lyshaug referred to as "floaters." He defined a boulder as a rock of a foot and a half to two feet in diam-

¹³ The project commences at elevation 3,854 feet in the west, ascends to a high of 4,934 feet at station 162+00 in the middle section and then descends to 4,300 feet at station 279+30, east.

¹⁴ Tr. 169, photos on page 10 of App's Exh. 4. When asked on cross-examination why he did not inquire of the Bureau of Indian Affairs as to what the holes represented, Mr. Lyshaug replied " * * * that whatever an officer says to you what a test hole is, it doesn't mean a thing. I had to rely on my own judgment when I look in a test hole." (Tr. 312.) This, of course, is nothing more than a restatement of paragraph 2 "Conditions Affecting the Work" of the Instructions to Bidders (Standard Form 22, June 1964 Edition) which provides that the Government assumes no responsibility for representations made by any of its agents unless included in the invitation or related documents. See also Clause 13, "Conditions Affecting the Work," of the General Provisions.

¹⁵ Tr. 172, 173. Although Mr. Lyshaug referred to this area as station 0, middle section, the plans (Exh. B) reflect that Trout Lake Road intersects the right-of-way at station 5+52 and that the middle section commences at station 5+25.

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eter and stated that " * * * you figure you could handle them with a dozer." (Tr. 174.)

Retracing their steps, they proceeded westward to where the heavy timber commenced at approximately station 80, western section (Tr. 175). They then returned to the car and approached the project from the west at station 0+00 (Tr. 175, 176). They crossed the creek at station 14, observing rock in the creek and walked eastward to approximately station 28 (Tr. 177). The site exploration was discontinued because of darkness. Mr. Lyshaug was of the belief that the heavy stand of timber (estimated at 60,000 to 70,000 board feet per acre) made it reasonable to expect from ten to 15 feet of soil cover (Tr. 177).

The plans reflected the amount of excavation and the amount of material to be placed in embankment. For example, the first balance point between station 0+00 and 2+15 in the west section reflects excavation of 369 cubic yards and embankment of 259 cubic yards. This indicates that 369 cubic yards of excavation are expected to fill 259 cubic yards of embankment (Tr. 192, 193). This difference, which is referred to as a shrink or compaction factor, is based upon the principle that common material shrinks when excavated and placed in a fill while rock swells.¹⁶ To Mr. Lyshaug, a shrink factor of approximately 30 percent

obviously meant common materials.¹⁷ The majority of design compaction factors in the western section were 30 percent except for 20 percent between stations 42+00 and 58+00 and ten percent between 98+00 and 102+50 (Table I, p. 39, Findings of Fact). Design compaction factors in the middle section range from zero percent to minus 30 percent with the majority at minus ten percent. Design compaction factors in the eastern section were zero percent and ten percent. These figures were not shown on the plans, but vary only slightly from calculated factors using excavation and embankment quantities shown on the plans.¹⁸

According to Mr. Lyshaug, the significance of a set of plans that goes into such detail is that a prospective contractor can determine where the material is going to come from, where it is going to go and that a section of the roadway can be completely finished as the work proceeds (Tr. 191, 192). He testified that from the absence of a pay item for borrow and lack of a des-

the rock, but that the swell would not be less than 15 percent and would not exceed 40 percent when drilled, blasted and placed in the fill (Tr. 398-402).

¹⁷ Tr. 193. The accuracy of this assumption is conceded by the contracting officer (pars. 78 and 90, Findings of Fact).

¹⁸ The calculated compaction factor from the plans reflects a plus 9.3 percent in the area between station 208+98 and 216+20, middle section and a plus 3.2 percent in the area between station 267+31 and 280+19, eastern section (Table I, Findings). However, both of these areas are indicated to have "forced balances," i.e., an arbitrary addition or subtraction of yardage in order to obtain a balance of excavation and embankment (Tr. 549).

¹⁶ Mr. Ronald McReary, an expert witness for PHL, testified that rock swells 40 percent and often 60 percent when drilled and blasted (Tr. 36, 44, 45). In later testimony he asserted that the swell depends upon the hardness of

ignated borrow source together with the statement that it was anticipated that hauling of excavated material in excess of 1,000 feet would be nominal¹⁹ and that no separate payment would be made for overhaul, the contractor would have to assume that there was sufficient material within a balance point to complete the operation including finishing (Tr. 208-211). Mr. McReary testified that in order to determine balance points, the designer needs information as to soil conditions or his balance points may well be meaningless (Tr. 386).

Although anticipating that a substantial amount of drilling and shooting would be required in the east section and in the eastern portion of the middle section, PHL evaluated the job as basically a scraper and dozer operation.²⁰ They considered that the Government must have evaluated the job in essentially the same way since PHL's bid price of \$1.10 per cubic yard for excavation compared favorably

with the Government's estimate of \$1 (Tr. 213). Other bids apparently ranged up to \$1.30 per cubic yard for excavation and total estimated prices ranged up to \$800,000 (Tr. 374).

Contract Performance

The contract provided that the work would be completed within 480 days after receipt of the Notice to Proceed. It also provided that the special subbase on the 9.229 miles of previously constructed roadbed would be completed prior to September 30, 1968. Article 20.10 of the Special Provisions stated that the Notice to Proceed would be issued on or about June 1, 1968. However, because the snow cover on the western end of the project was unusually low and because PHL desired to proceed with the clearing as soon as possible in order to minimize the amount of clearing work during the dry, fire season, PHL requested and was granted a Notice to Proceed commencing on April 16, 1968, thereby establishing August 8, 1969 as the completion date (letters of March 26 and April 16, 1968, Exhs. 12 & 13, respectively).

PHL contemplated attacking the project from west and the east simultaneously (Tr. 217). The west end was to be supervised by Mr. Jack Adams and the east end was to be directed by Mr. Propes and Jill Adams while Mr. Lyshaug was to coordinate the work and look after engineering details (Tr. 119). Drilling and shooting operations

¹⁹ Planned overhaul (haul in excess of 1,000 feet) ranging from 5 to 739 feet was contemplated at 14 balance points (Exh. 45). PHL concedes that it anticipated a small amount of overhaul at station 270+ in the eastern section (p. 2 claim letter of November 5, 1969, Exh. 6).

²⁰ Tr. 114, 115, 219, 238, 239. Although Mr. Propes testified that he was told by Tor and Jill that they observed rock outcroppings on the west end of the job (Tr. 108, 113), we conclude that he was confused for he stated the reason they did not see all of the west end of the job was because of snow (Mr. Lyshaug testified that there was no snow on the west end, Tr. 297), and as we have seen the only rock outcrops other than those in the creek observed by Mr. Lyshaug and Mr. Adams during their site inspection were in the east section and east of the pond, at station 160, middle section.

were subcontracted to Frank Adams (Tr. 121, 122; Contractor's Questionnaire, dated June 1, 1968, Exh. 14).

Excavation in the east section commenced on or about May 24, 1968 (entry of even date, Project Diary, App's Exh. 9). It was important that the eastern section be completed as soon as possible in order that the special subbase could be hauled to the previously constructed road which the contract required be completed prior to September 30, 1968. They immediately hit solid rock which they were unable to rip.²¹ In the words of Mr. Propes " * * * all we could do then was pioneer ahead and skip here and there and try to find some material we could rip." (Tr. 122.) This situation continued through the first two cuts and it was not until the third cut (station 268 to 253) that they found material which could be partially ripped. They sent for another track drill.²²

The rock in these cuts came out in boulders of from two to six feet in diameter, resulting in a shortage of material suitable for finishing the

grade.²³ Mr. Propes testified that this was the first job that he had ever seen that was of this nature (Tr. 125) and that "Anytime you have that deep a cut, you would normally get, no matter whether you drilled it or shot it or ripped it, you would normally get enough finish, to bring the road up to grade." (Tr. 335.) Mr. Walton of the Federal Highway Administration, although anticipating that the section of the project he observed contained rock, did not anticipate any difficulty in obtaining adequate finishing materials (Tr. 482, 483, 501). The consequence of the lack of finishing material was that PHL was unable to complete the work in a station to station sequence as planned. The Government ultimately recognized the lack of finishing material and provided for overhaul, that is haul in excess of 1,000 feet, by Change Order No. 2 dated June 30, 1969 (Exh. 3 and Justification for Change Order No. 2, App's Exh. 12). PHL's claim for costs of grading changes caused by the Government's refusal to provide for borrow is considered *infra*.

Contrary to its expectation, PHL immediately ran into rock from station 0 + 00 to 14, western section. (Tr. 220, 223.) Since PHL was not equipped for a drilling and shooting operation in this section, they proceeded to open up other areas where excavation could be accomplished

²¹ Tr. 121-124; Project Diary, entry of May 24, 1968. Mr. Bilderback testified that there was not a cut on the entire project which he would classify as completely solid rock (Tr. 474). However, we accept his characterization of the rock made prior to the dispute (Project Diary of May 24, 1968). Similar references to "solid rock" appear in numerous other diary entries.

²² Tr. 121, 123. Drilling operations commenced on the east end with one drill on or about June 5, 1968. A second drill was brought to the job on or about June 11 and a third drill was on the job in the eastern section on June 24, 1968. (Daily Log of dates cited, Gov't's Exh. B.)

²³ Tr. 125-127, 136, 149, 150, 236, 237, 336-339, 344. The top four inches of subgrade was to be composed of material which would pass a three-inch screen (Articles 102-3.10 and 106-3.4 of FP-61).

with bulldozers rather than proceeding from station to station as required by the contract (Tr. 221, 224).

They found material that could be moved with bulldozers between stations 42 and 52. There was an error in the P-line survey, referred to as a "bust," which required resetting of the center line between station 0 + 00 and station 48.²⁴ The grade was raised two feet between station 0 + 00 and station 40. Nevertheless, there was an excess of material in this area.²⁵ There were also survey and staking errors at station 58 making necessary a one foot cut for 150 feet (Project Diary, July 9 and 10, 1968).

PHL also encountered excess material in the area between stations 65 and 73, making it impossible to complete the cut (Tr. 224-226). A diary entry of June 27, 1968, states that the road is just about to grade from station 49 to 90 except the cut at station 69 which has considerable waste. The grade between stations 65 and 76 was raised three feet on July 18 1968, in order to eliminate wasting of excess material (Tr. 320, 324, 326; Project Diary of even date). Nevertheless, photos of the

completed road in this area show excess material which was wasted beyond the clearing line into the trees (p. 17, App's Exh. 4). Grading in this area was not completed until late August of 1969 (Tr. 327). Delay in completing the west section was due in part to the encountering of unanticipated rock and in part to actions of the project inspector.²⁶

Areas in the west and middle sections where PHL encountered rock are shown on the mass diagram (App's Exh. 2) as follows:

WEST

Stations:	Ripped	Drill & Shoot
1+25 thru 4-----		15 to 16
18 thru 26-----		18 thru 22
31 thru 35-----		25 and 26
38 thru 42-----		32+90 to 33+90
55+25 to 57+25----		83 and 84
67 thru 70-----		
102-----		
105 and 106-----		

²⁴ Tr. 509; Project Diary entries of June 24, June 26, June 27, June 28, July 1 and July 2, 1968, App's Exh. 9.

²⁵ The Diary entry of July 1, 1968, states that the area between station 30 and station five (west end) appeared to be all cut and no fill. Photos dated September 6, 1968 and June 21, 1969, show piles of boulders at station 0+00 (p. 10, App's Exh. 4). These were eventually hauled to the fill at station 14 under Change Order No. 2.

²⁶ Mr. Lyshaug testified that the delay was attributable to the drilling and shooting remaining to be accomplished and to the refusal of the contracting officer's representative, meaning Mr. Bilderback, to make a decision as to the disposition of excess material until it could be determined how the next balance was going to come out (Tr. 228, 231, 240, 325-327). However, diary entries concerning discussions with PHL representatives indicate the decision to discontinue operations in the west section was due to a desire to finish the higher elevations of the project first and to finish grading in the east in order to haul special subbase material (Project Diary of July 8 and 12, 1968). We accept Mr. Lyshaug's testimony because as we find *infra*, it is consistent with other actions of the project inspector and because the Justification for Change Order No. 2, dated June 26, 1969 (App's Exh. 12), indicates the overhaul of excess material from stations 51 to 70, to stations five and 15, west section. The need for additional material at station five was apparently due to the grade change (Tr. 225).

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MIDDLE

21+50 to 24+90 ----	8 and 9
30+50 to 34-----	16+50 thru 18+75
37 thru 40+80-----	21+90 thru 24+90
45 thru 48-----	27+40 thru 27+60
88 thru 94-----	31 thru 34
101 thru 103+50----	37 thru 40+80
105 thru 110-----	52 thru 55
115+50 thru 121----	64 thru 70+20
124+50 thru 125+50--	78+80 thru 80+80
127 thru 132+20----	88 thru 94
140 thru 150+50----	115 thru 121
156+50 thru 161----	127 thru 132+20
177 thru 184+20----	141 thru 150
189 thru 194-----	157+60 thru 159+50
198 and 199-----	181 thru 184+50
203 and 204-----	188 thru 200 202 thru 228+53 ²⁷

²⁷ This list differs somewhat from the areas where PHL allegedly did not anticipate rock (p. 4, Exh. 7; App's Exh. 10), which are as follows:

0+00 to 2+15	66+77 to 75+84
2+15 to 4+06	75+84 to 83+58
14+73 to 20+98	83+58 to 91+59
20+98 to 30+73	91+59 to 99+08
30+73 to 37+95	99+08 to 107+70
37+95 to 42+63	128+68 to 138+73
6+53 to 17+92	138+73 to 144+10
24+90 to 35+85	144+10 to 154+63
35+85 to 47+14	154+63 to 157+15
47+14 to 55+72	178+45 to 188+79
55+72 to 66+77	188+79 to 197+51

These areas where rock was encountered are derived from PHL and Government records (Tr. 31, 53). Our review of the Daily Log (Gov't's Exh. B) and Project Diaries (App's Exh. 9) has enabled us to verify almost in toto the areas where drilling and shooting operations were conducted. We have been unable to verify to the same extent the areas which were assertedly ripped. This is due to two principal

reasons: (1) all but one of the six large tractors (four C-6's, a D-9 and a D-8) which were on the job at various times, were equipped with a ripper as well as a bulldozer and records of when one operation or the other were being performed were not maintained (Tr. 244, 245); and (2) confusion as to the location of work being performed.²⁸ The Government has made no serious attempt to dispute the presence of rock at the locations as shown and we accept the mass diagram as substantially accurate in this respect.

PHL placed the Government on notice that it had encountered rock in the upper (middle) and western sections of the job, despite the fact that the contract indicated this would be common excavation, in a letter dated September 10, 1968 (Exh. 8).

PHL suspended operations for the winter on October 7, 1968 (Project Diary of even date). At this time only the sections from 224 to 229 and from 260 to the end of the project in the eastern section were finished while the balance of this section was not to 3/10 of a foot tolerance as required (Findings, Par. 132; Project Diary of June 19, 1969). From station 120 to 224 in the middle section, the grade was just roughed in. About half the excavation was completed in the area from station 100 to 120, middle section. In the area from station five to 100, middle section, virtually no

²⁸ Because of the overlapping station numbers, personnel maintaining the records were frequently confused as to the location of various work operations.

excavation had been accomplished. From station 35 to 113, west end, most of the excavation had been done, but the grade was not to specification tolerances.

Work was resumed on the project on July 7, 1969 (Project Diary of even date). Completion of the project was subcontracted to Hall International because PHL was no longer able to finance the work.²⁹ The project was accepted as complete on September 16, 1969, two weeks after the completion date of September 2, as extended (Daily Log of September 16, 1969; Construction Inspection Report dated September 16, 1969, Exh. 25). The contract did not contain a liquidated damages clause and the Bureau has not attempted to assess any charges for the delayed completion (memorandum, dated September 19, 1969, Exh. 26).

Discussion and Further Findings

PHL asserts that it encountered subsurface rock where the contract and plans indicated the presence of common material. Based on the established principle that rock swells when excavated and placed in the fills while common material shrinks (note 16, *supra*), PHL argues that the compaction factors calculated from the excavation and embankment quantities shown within the balance points on the plans reasonably led it to expect common material in the western section, com-

mon with some rock in the middle section and that the rock in the eastern section was rippable and would yield ample materials for finishing (Brief, pp. 12-16, 20; Reply Brief, pp. 4, 5 and 12). PHL contends that its expectations of the materials to be encountered as derived from its site inspection and compaction factors calculated from the plans were strengthened by the fact the contract specified that overhaul would be nominal, that no borrow sources or waste disposal areas were designated on the plans, that the contract required the top four inches of subgrade be finished with material which would pass a three-inch screen and that the grade was to be finished to within $\frac{3}{10}$ of a foot as the work proceeded. PHL also relies upon the Government's failure to disclose the information in the soils report (Exh. 37).

PHL contends that it reasonably anticipated that 41 percent of the excavation would be rock (in the eastern section and eastern portion of the middle sections), whereas rock actually encountered amounted to 87 percent of the excavation (claim letter, dated November 5, 1969; Brief, p. 22). PHL also contends that it anticipated a balanced job, *i.e.*, that excavation quantities within the balance points on the plans would compact to the embankment quantities within such points, whereas not one of such points actually balanced and that this condition as well as the lack of finishing material is attributable to the fact the project was designed for

²⁹ Tr. 142, 155, 156; Project Diary of June 26 and July 3, 1969. It appears that PHL lost between \$160,000 and \$170,000 in 1968 (Tr. 214).

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common material but rock was encountered.

Although Mr. McReary acknowledged that material could not accurately be classified solely from compaction factors (Tr. 65, 66), the Government does not dispute PHL's contention that compaction factors are an indication of materials expected to be encountered.³⁰ Mr. Bilderback, although emphasizing that compaction factors were an estimate, admitted that the contractor should have considered them as being reasonably accurate (Tr. 573, 620-622). Mr. Erickson testified that the contractor should not rely on the difference between the excavation and embankment of the materials to be encountered without visiting the site, but conceded that his opinion would be otherwise if the contractor visited the site and saw no reason to question the accuracy of the plans (Tr. 715, 716).

The Government concedes that the unanticipated rock encountered by PHL in the areas between station 0+00 and 37+95 in the western section probably constitutes a changed condition (Brief, p. 16). However, the Government asserts that PHL's site investigation was inadequate, that the soils report disclosed nothing which was not obvi-

ous upon a reasonable site inspection, that conditions encountered were substantially as expected by the Bureau, that the amount of rock PHL alleges to have encountered is grossly overstated, and that any detriment suffered by PHL because of the changed condition in the western section was more than offset by the existence of common material in other areas where the Bureau expected, and PHL should have expected rock.

The details of the site investigations by Mr. Bilderback and Mr. Lyshaug recited earlier make it obvious that PHL's site inspection was at least as extensive as that of Mr. Bilderback, who designed the project. Accordingly, the Government's criticism of PHL's site inspection is valid only if PHL didn't see or ignored obvious manifestations of rock. The Government relies on 25 photographs, taken on July 20, 1970, of which only 17 are pertinent³¹ to support its contention that the existence of rock was obvious. These pictures were taken after the project was completed and after the claims were filed. The photos purport to show rock outcrops, boulders and rock ledges at varying and in some instances unspecified distances to the right or left of the completed roadway. The difference in terminology is significant. Although it is not entirely clear, the

³⁰ Findings, note 17, *supra*; Brief, p. 4. Interestingly, Mr. Walton testified that since this was a "scratch job" with shallow cuts and fills, the normal swell factor for rock does not apply in that the contractor should assume that some of the material would have to be wasted in widening the fill slopes (Tr. 485-486, 495, 496). Other than an unsupported statement in the findings, there is no evidence that the project was designed or that the contract was administered with this concept in mind.

³¹ Exhibit 46. The first two involve rock in areas where the Government concedes it did not anticipate rock (note 6, *supra*), and the last six involve areas from station 203+90 to 219+00, middle section, where PHL does not claim it encountered unanticipated rock (note 27, *supra*).

"rock outcrops" in photos four, five, six and 18, appear, in fact, to be loose boulders. Mr. McReary testified that in his experience boulders on the surface were out of place, having been transported by glacial action or otherwise, and were not necessarily an indication of material beneath the surface (Tr. 400).

Other photos, *i.e.*, seven, eight, ten and 13, depicting what are labeled boulders or rock could show loose surface rocks. Photo nine is asserted to depict "boulders in gully" (Brief, p. 9). Being beneath the road surface, this is not necessarily an indication of rock in the roadway. There is, of course, no doubt that most of the remaining photos accurately depict rock outcrops. However, we cannot overlook the fact that what is obvious as a matter of hindsight may not have been so as a matter of foresight. In addition, Mr. Powell spent considerable time relocating the eastern portion of the middle section of the roadway for the express purpose of avoiding rock.³² Lastly, we think there is considerable merit in PHL's assertion that notwithstanding the Bureau's present contentions, it, in fact, viewed this project in much the same manner as did PHL. We conclude that PHL's site investigation was reasonable³³ and that the Government's contentions to the

contrary have not been sustained.³⁴

Having found that PHL's site investigation was at least as extensive as that of the Bureau's engineer who designed the project and reasonable under the circumstances, the assertion that PHL was not harmed³⁵ by the failure to disclose the soils report may be disposed of rather quickly. We, of course, recognize that there can be no contractual liability for the failure to disclose what is obvious and that soil borings and soil data may not accurately disclose area soil conditions.³⁶ However, inherent in our determination that PHL's site investigation was reasonable is the conclusion that the existence of rock was not obvious in the areas where PHL claims it encountered unanticipated rock and it is settled that PHL was entitled to full disclosure.³⁷ This finding necessarily disposes of the Government's contention that any detriment suffered by PHL by the encountering of rock in the western section is offset by the fact common material was encountered in the middle section in areas where rock should have been anticipated.

To support its contention that

³² The Government suggests that PHL was remiss for failing to probe the test holes with appropriate tools (Brief, p. 8). We have rejected similar contentions in the past, *Harris Paving and Construction Company*, IBCA 487-3-65 (July 31, 1967), 74 I.D. 218, 67-2 BCA par. 6468, and reject them here.

³³ Mr. Lyshaug testified that had PHL been aware of the soils report its estimate of costs would certainly have changed and that it was doubtful if they would have bid since their equipment was not suitable for such extensive drilling and shooting (Tr. 216).

³⁴ *Maurice Mandel v. United States*, 424 F.2d 1252 (8th Cir., 1970).

³⁵ *Ragonese v. United States*, 128 Ct. Cl. 156 (1954); *Leat v. United States*, 149 Ct. Cl. 451

³² Tr. 686-688. He considered that he had done "a pretty good job." (Tr. 688.)

³³ In reaching this conclusion, we are influenced by the Government's failure to disclose the soils report. See *Maryland Painting Company*, Eng. BCA, No. 3337 (August 17, 1973), 73-2 BCA par. 10, 223.

conditions encountered were substantially as expected, the Government points to the close correlation between total estimated excavation of 202,100 cubic yards and asserted actual excavation, including borrow, of 219,403.0 cubic yards.³⁸ While the asserted actual quantities are pay quantities and would presumably be accurate or reasonably so, it is clear that these "actual" quantities do not include the contractor's claim for additional excavation which was settled by the Government's agreement to pay for 20,000 additional cubic yards (Tr. 40). In addition, the contract required that pay quantities be determined by the average end-area method, the material being measured in its original position (Article 102-4.1 of FP-61; Article 9.1, p. 23, of the General Requirements). While the extent to which pay quantities were actually determined by such measurements is not clear,³⁹ it is obvious that such measurements bear no relationship to the kind of material excavated (Tr. 60).

Related to the question of whether this project turned out as planned is the question of whether this was a balanced job. PHL asserts that contrary to its expectation, not one

(1960); *Anderson & Guerrero*, ASBCA No. 17041 (November 29, 1972), 73-1 BCA par. 9802. Cf. *Flippin Materials Company et al. v. United States*, 160 Ct. Cl. 357 (1960).

³⁸ Tr. 580; Findings, pp. 49, 50; Brief, p. 17. Mr. Bilderback testified that the increase of 8.6 percent of excavation over that planned " * * * is a very, very good result in this kind of a tough, mountain, rock job. I think it could be twice that and still be considered very good." (Tr. 579.)

³⁹ Payment was made on the basis of remeasurements and on the basis of an agreed yardage with the contractor (Tr. 547, 627).

cut actually balanced (Tr. 227-229; 316; Reply Brief, p. 15). PHL attributes this to the fact that the project was designed for dirt while rock was actually encountered. PHL relies upon the shortage of finishing material, discussed *infra*, and upon the fact that it was necessary to supply substantial quantities of borrow even though no borrow sources or estimated quantities of borrow were shown on the plans.⁴⁰ Some 21 borrow pits, several of which are listed as unauthorized, from which an estimated quantity of 5,525.3 cubic yards of material was excavated, were apparently utilized through October 3, 1968. (Findings, Table VI.) Mr. McReary testified that there were a total of 23 or 24 borrow sources (Tr. 34). Since the record indicates that PHL obtained or attempted to obtain borrow from several sources not listed in Table VI of the Findings (Project Diary of September 29, 1968), there is a question as to the accuracy of this total. Table V (Findings, p. 50) indicates total borrow of 26,631.4 yards amounting to 13.4 percent of design yardage. Since the contract provided that borrow would be considered for payment as unclassified excavation, the amount of material upon which overhaul was paid would appear more significant than the quantity of borrow or number of borrow sources. However, despite the fact that a purpose of a mass diagram is to depict the movement of mate-

⁴⁰ Mr. Erickson testified that the Bureau expected to pay for borrow as excavation, but conceded that "We didn't expect to have to overhaul in order to get borrow." (Tr. 712.)

rial for pay purposes (Tr. 629), the record does not reflect the total quantity upon which overhaul was paid under Change Order No. 2.⁴¹

Mr. Bilderback acknowledged that none of the cuts on the project actually balanced. He testified "I think that some of the balances on the job were quite close." (Tr. 587.) He stated that balances in the eastern section were generally long, that is had excess material, that balances in the middle section were generally short and admitted that the western section was not comparable because of the redesign (Tr. 587, 588). He was, nevertheless, of the opinion that the project balanced quite well. It is, of course, hardly surprising that the author of a design will defend its validity. In addition, Mr. Bilderback's testimony is based upon the mass diagram which was compiled at the time the findings were prepared (Tr. 629), has the deficiencies hereinafter noted, and understates actual excavation by 20,000 cubic yards. As we find *infra*, the project was cross-sectioned after completion only in the eastern section. Mr. McReary testified without contradiction that there were forced balances utilized in compiling the mass diagram and that it was impossible to construct a mass diagram to reveal where the balance points are without knowing the value of the cuts as built and the volume of

the embankment (Tr. 37, 38). We find that not one balance area actually balanced⁴² and that there were significant and substantial variances between the design and actual balance quantities.

The other half of the Government's contention that conditions encountered were substantially as expected is the assertion that PHL did not encounter as much rock as it claims. The Government asserts that it expected that some rock would be encountered in 85.8 percent of the excavation (par. 81, Findings of Fact). A table (Table II, p. 43, of the Findings) compares percentages of rock allegedly anticipated in the design with the amount of rock⁴³ actually encountered in the areas where PHL claims unanticipated rock (note 27, *supra*) and purports to demonstrate that PHL actually encountered 9,000 cubic yards less rock in these areas than anticipated in the design. Aside from the com-

⁴² It is, of course, clear that quantities shown within balance points are not, and should not be, expected to be precise. The "L-line" was not staked at the time of bidding and the plans, Sheet No. 2, state:

"LINE AND GRADE AS SHOWN ON SHEETS 4 TO 19 ARE SUBJECT TO ADJUSTMENT."

See also Article 4.2 "Change in Drawing and Specifications—Adjustments in Quantities of the General Requirements, which provides, *inter alia*, " * * * that it is inherent in the nature of the construction work to be performed under this contract that minor changes in the plans and specifications may be necessary during the course of construction to adjust them to field conditions * * *." In addition, see Article 105-1.1 of the Special Provision providing in part that "End-hauling of excavation material from one balance section into another will be limited to 1,000 feet."

⁴³ Rock for this purpose is defined as material which was drilled and blasted or which in Mr. Bilderback's opinion required drilling and blasting (Tr. 645).

⁴¹ The mass diagram reflects overhaul of 3,296 cubic yards in the west end and a small amount in the extreme east end. Overhaul on borrow from the pit at station 174, middle section, is not shown as such. Estimated overhaul totaled 5,750 yards (Justification for Change Order No. 2, App's Exh. 12).

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paction factors as calculated from the plans there is no documentary evidence, dated prior to the invitation, to support the percentages of rock the Government now claims to have anticipated. The percentages of anticipated rock shown in Table II are based on a schedule, "Design Compaction Factors and Anticipated Excavation" (Exh. 38), which was compiled at the time the findings were prepared from Mr. Bilderback's memory of how he designed the project (Tr. 617, 618). Mr. Bilderback acknowledged that he made no field notes at the time of his site visit and testified that the percentages of anticipated rock were carried back to the office in his head.⁴⁴

The findings (par. 80) state that compaction factors used in the design were based on material expected to be encountered. A compaction factor of minus zero to minus ten percent was allegedly for predominantly rock excavation, minus 20 percent was for heterogeneous excavation of rock and dirt and minus 30 percent was allegedly for predominantly dirt excavation (par. 78, Findings).

Table II shows a compaction factor ranging for a minus 29.8 percent to minus 30.1 percent in the area between 0+00 and 42+63, western section and admits that the Government did not anticipate rock in this area. In the area from 6+53 to 17+92, middle section, the com-

paction factor calculated from the plans is a minus 19.3 percent and rock allegedly anticipated in the design was 63 percent. In the area from 24+90 to 35+85 middle section, the calculated compaction factor is a minus 16.9 percent and rock allegedly anticipated in the design is 75 percent. Calculated compaction factors in the area between 35+85 to 75+84, middle section, range between minus 15.5 percent and minus 21.6 percent and the rock allegedly anticipated in the design is shown as 50 percent. Between stations 128+68 to 197+51, middle section, compaction factors vary from a minus 10 percent to a minus 18.5 percent and rock allegedly anticipated in the design is uniformly shown as 90 percent.

The foregoing demonstrates that compaction factors as calculated from the plans, which vary only insignificantly from compaction factors assertedly utilized in the design, have little or no relation to the percentages of rock the Government now claims to have anticipated.

A second difficulty with Table II is the amount of rock actually encountered. The findings (par. 86) as well as Mr. Bilderback's testimony (Tr. 464, 465, 577, 668), would lead to the conclusion that the percentages of rock encountered are based upon on-the-spot observations as recorded in the daily log and project diaries. However, on cross-examination, Mr. Bilderback admitted that the specific percentages did not appear in the records and

⁴⁴ Tr. 618, 641. With respect to this testimony, appellant's counsel makes the observation that it "strains credulity" (Reply Brief, p. 6).

that these were his estimates.⁴⁵ PHL claims 62,991 cubic yards of rock in the areas where unanticipated rock was encountered⁴⁶ whereas the calculations in Table II indicate only 23,536 yards of rock in the claim areas, including 2,040 cubic yards of rock in channel changes which were not specifically included in the claim but are within the claim areas. The quantities of unanticipated rock claimed by PHL are also based on estimates (Tr. 242, 328, 330).

Quantum not being before us, we need not resolve the controversy over the amount of rock encountered.⁴⁷ Nevertheless, we will review briefly the evidence in this regard in order to bring into focus additional arguments of the Government that conditions encountered on the project were substantially as expected. Based on a review of Gov-

ernment and PHL records relating to drilling and shooting, appellant's expert witness, Mr. McReary, estimated that drilled and shot rock and ripped rock, not drilled and shot, amounted to 175,000 cubic yards (Tr. 375, 445). Mr. Lyshaug, based on 2,039 total number of drilling hours (App's Exh. 6), powder consumption totaling 153,780 pounds and 15,642 caps expended (App's Exh. 5), estimated that rock drilled and shot on the project exceeded 160,000 yards (Tr. 242, 328-331). He testified that hours spent drilling and shooting were more than twice what he anticipated. He also estimated that because of its bouldery condition they ripped 30,000 yards of rock which had been previously drilled and shot (Tr. 328, 329). Mr. Bilderback estimated total rock excavation at approximately 100,000 cubic yards.⁴⁸

Based upon swell of from 40 to 60 percent for rock testified to by Mr. McReary, the Government argues that the amount of rock PHL alleges it encountered would extend the width of the embankment from the design width of 32 to 36 feet to 56 to 71 feet and place the fills in the woods throughout 87 percent of

⁴⁵ Tr. 637, 667, 677. Our examination of the project diaries and the daily log reveals the use of percentage of rock encountered in isolated instances, e.g., Daily Log of September 9, 1968 and August 6, 1969. All of such percentages are based upon estimates and not actual measurements.

⁴⁶ App's Exh. 10. However, 3,287 cubic yards of rock allegedly encountered between station 55+72 and 66+77 and 6,314 cubic yards of rock allegedly encountered between station 66+77 and 75+84 have been marked out with a pencil. Mr. Lyshaug testified that this was because of a typing error (Tr. 194). Subtraction of these amounts would reduce the claimed yardage to 53,390.

⁴⁷ In *Roscoe-Ajax Construction Company, Inc. and Knickerbocker Construction Corporation v. United States*, 198 Ct. Cl. 133 (1972), it was held to be error, in a case where quantum was not before the Board, to deny a changed condition claim upon the ground the alleged change was not shown to be material without deciding whether a changed condition had, in fact, been encountered. We have no hesitancy in determining that the amount of rock encountered by PHL was material. See *United Contractors v. United States*, 177 Ct. Cl. 151 (1966).

⁴⁸ Tr. 465, 644, 645. This figure was based on accepting PHL's statement that it anticipated that 41 percent of total excavation would be rock and adding thereto 23,536 yards of rock encountered in the areas where PHL states it did not anticipate rock. Mr. Bilderback's estimate excludes all overburden (Tr. 646-649), while PHL contends that as a practical matter, and in accordance with industry practice, rock with a foot or two of overburden must be treated as all rock (Tr. 53, 199, 200, 280).

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the job (Tr. 551, 552; Brief pp. 13, 14). Mr. Bilderback characterized this result as "unthinkable." (Tr. 552.) He asserted that, in fact, material went into the woods in possibly two isolated spots. As we have found, the 40 to 60 percent range for swell given by Mr. McReary was immediately after drilling and blasting and the actual swell would reduce to between 15 and 40 percent when the rock was moved and placed in the fill (note 16, *supra*). Based on some rough calculations and the fact that the material will subside and compact where traveled by heavy equipment, Mr. Lyshaug testified that the additional material could be accommodated in an additional foot or a foot and three quarters of fill width.⁴⁹

Although Mr. Bilderback has compiled a mass diagram (Exh. 44; App's Exh. 2) purporting to show precise quantities for excavation, borrow and waste, the completed road was cross-sectioned only in the eastern portion (Tr. 625; 630). Mr. McReary testified that without cross-sectioning the mass diagram was only a matter of judgment or an educated guess at best (Tr. 35, 36, 46-48). He asserted that with rock "What is commonly done is that fills are built wider, and because they are not recross-sectioned, no one really knows what volume is contained in that fill." (Tr. 52.) Mr. Lyshaug indicated that the necessity

of disposing of boulders resulted in an irregular slope beyond the embankment line (Tr. 262-264). The measurements which would determine whether the road is wider than the design width in the eastern section are not in evidence. Mr. Bilderback testified that there was a six percent difference between staked and final cross-sections in the eastern portion and that since there was less rock in the western and middle portions of the road, he would expect the difference in those sections to be less than six percent (Tr. 547, 596).

As we find *infra*, the Government's position that the road was not built beyond the design width to any significant degree is contrary to the position taken by Mr. Bilderback while the road was being constructed. Photos of the completed, or nearly completed, road show substantial quantities of material wasted into the trees at stations 52, 73, 84, 103, 142 and 186, middle section and at stations 205 and 210 in the eastern section (pp. 17, 23, 25, 28, 30 and 31, App's Exh. 4). Other photos taken by the Government prior to completion (Appeal Exh. 6 of Exh. A) for the purpose of demonstrating that material was wasted clearly show extra width of the roadway or embankment. Mr. Bilderback acknowledged that the road was wider than the design width between stations 160 and 216, east, because of material that was wasted (Tr. 553). It was also necessary for appellant to excavate fill sections in order to dispose of large

⁴⁹ Tr. 736-740. The Government cites Mr. Bilderback as testifying that the road exceeded design width in only two or three instances. His actual testimony was "Except for those two or three instances, no material went into the woods." (Tr. 553.)

boulders (Tr. 141; photos, p. 9, App's Exh. 4). We find that the road exceeded its design width to an undetermined but significant degree and that the Government has not sustained its contention that it anticipated rock to the extent now claimed.

In addition to the compaction factors as calculated from the plans, PHL relies upon the Government's estimate of one dollar for excavation as compared to the contract price of \$1.10 to support its assertion that the Government, in fact, viewed this project in much the same manner as PHL. Government witnesses insisted that the one dollar estimate was reasonable (Tr. 84, 495, 713). We conclude that this contention has merit and is an additional reason for finding that the Government did not anticipate as much rock as it now claims.

DECISION

It is now settled that in considering a category one "changed condition" claim express representations as to the conditions to be encountered are not necessary and that the issue is whether " * * * There were such indications which induced reasonable reliance by the successful bidder that subsurface conditions would be more favorable than those encountered." ⁵⁰ PHL's contention that the contract documents did contain indications that conditions

would be more favorable than those encountered has been set forth above and will be repeated here only to the extent necessary to the decision.

In *James H. Clack v. United States* ⁵¹ and *Pacific Alaska Contractors, Inc. v. United States*, note 50, *supra*, the Court rejected contentions very similar to those here advanced by PHL. In *Clack*, the Court held that notes on the contract plans, seemingly indistinguishable in effect from the note on the plans herein (note 42, *supra*), together with the fact the project cross-sections were not staked at the time of bidding, also a fact here, should have placed plaintiff on notice that there would be some change in excavation and embankment quantities. The Court rejected plaintiff's contention that each balance area was to be considered separate from other balances and denied the claim for a constructive change based upon the contention plaintiff had to excavate more material and haul it greater distances than contemplated.

In *Pacific Alaska Contractors, Inc., supra*, the Court characterized the intent of the Government agents that the project would be a balanced one as merely "hopes, expectations, guesses, or suggestions" and held that plaintiff was not warranted in drawing any conclusions from the rough estimates on the plans as to the balanced nature of the job and the underlying physical conditions. The Court emphasized the frequent

⁵⁰ *Pacific Alaska Contractors v. United States*, 193 Ct. Cl. 850-872 at 864 (1971). See also *J. E. Robertson et al. v. United States*, 194 Ct. Cl. 289 (1971).

⁵¹ 184 Ct. Cl. 40 (1968).

reminders that estimated quantities were to be viewed with great caution and said that the contract documents were substantially silent in this respect, which fact should have been recognized by the plaintiff.

The rationale of the above decisions would, at first blush, seem to be dispositive of the instant claim. However, in *Morrison-Knudsen Company, Inc. v. United States*,⁵² the Court held, inter alia, that contract drawings showing for various segments of the roadway "(1) excavation in cubic yards; (2) borrow in cubic yards; (3) embankment in cubic yards; (4) overhaul in station yards; (5) borrow overhaul in cubic-yard miles; (6) the specific borrow pit locations, * * * and (7) the quantities of unsuitable excavation material that were to be wasted" was information essential to the preparation and submission of a bid. The evidence showed that 65 percent of the designated borrow pits failed to produce suitable material as compared to a ten percent failure rate which might normally be expected. The Court held that plaintiff was justified in relying on the relative accuracy of the borrow pit locations and other data shown on the drawings, rejected a contention that a contract provision to the effect that the Government assumed no responsibility for the quantity of acceptable material at designated locations placed the entire risk of the suitability of the borrow sources on the contractor and ruled that actions of the Government in design-

nating substitute borrow sources and ordering plaintiff to perform borrow excavation and overhaul far in excess of quantities shown on the contract drawings constituted compensable changes, overturning a decision of this Board⁵³ to the effect that compensation in excess of contract prices was precluded unless the overrun was in excess of 25 percent.

Morrison-Knudsen, supra, was decided subsequent to *Clack* (note 51, *supra*), but *Clack* was not referred to therein. In *Pacific Alaska Contractors, Inc.* (note 50, *supra*), *Morrison-Knudsen* was distinguished upon the ground that " * * * there were very material differences in the usefulness of the borrow pits as compared to the indications in the contract documents * * *." 193 Ct. Cl. at 864. We conclude, however, that the Court's broad statements negating the contractor's right to rely on the accuracy of bid information must be viewed with caution and that the controlling finding in *Clack* was that the construction balance points did not differ to any great extent from the plan balances. Similarly, in *Pacific Alaska Contractors, Inc.*, the controlling finding was that the differences with respect to borrow pits between the contract indications and actual conditions encountered were not substantial or significant.

The record in this case reflects

⁵³ *Morrison-Knudsen Company, Inc.*, IBCA 36 and IBCA 50, 64 I.D. 185 (1957), 57-1 BCA par. 1264, affirmed on reconsideration, 66 I.D. 71 (1959), 59-1 BCA par. 2110.

⁵² 184 Ct. Cl. 661 (1968).

that the contractor should have been able to rely upon the fact that the excavation and embankment quantities shown within the balance points on the plans would be a rough approximation of the quantities encountered in actual construction and that the differences between these quantities, called "compaction factors," were based on materials expected to be encountered. Indeed, as in *Morrison-Knudsen, supra*, we do not believe an intelligent bid could have been submitted on this solicitation without balance point information.

The remaining question is whether conditions actually encountered differed materially and substantially from those indicated. We have found that there were significant and substantial variations between the design and actual balance area quantities and that the road exceeded its design width to a substantial but undetermined degree because of rock. We, therefore, find that the unanticipated rock encountered by appellant and the lack of borrow or suitable materials in situ constituted a changed condition.

Grading Changes

This claim is based upon the lack of suitable finishing materials in the middle and eastern section of the job and upon the changes in the contractor's method of operation made necessary by the Government's refusal to designate borrow sources when this condition was called to its attention.

The contract, as we have seen, re-

quired that the top four inches of roadway be completed with material which would pass a three inch screen. While the size of material permitted immediately below the top four inches is not clear, we note that the top 12 inches of subgrade were required to be rolled. It also provided that coarse rock and boulders were to be used in the formation of embankments and that where feasible such material was to be placed in lower sections thereby conserving the more suitable material for the top portions of the subgrade. The contractor clearly had an obligation to conserve material deemed suitable by the engineer for finishing or placing in the roadbed.

The record indicates that PHL representatives were told by the project inspector on several occasions that "finishing dirt" was being placed on the bottom of the fills and was not being saved (Project Diary of July 12, 15 and 18, 1968). On one such occasion, the project inspector was informed that PHL personnel were saving finishing material but they had been stopped by Mr. Lyshaug.⁵⁴ There is no evidence of the amount of materials involved in these requests.

Mr. Propes inquired of Mr. Bilderback where they were going to obtain 3,500 yards of material necessary to finish the fill from 261+00

⁵⁴Project Diary of July 18, 1968. Mr. Lyshang testified that he did so because they were removing a shallow layer of basically organic material from uneven rock and that operating under such conditions tore the equipment apart (Tr. 257, 258). He asserted that organic material was not suitable for finishing.

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to 267+13 (Project Diary of August 20, 1968). He was told that his fill was four to eight feet too wide and that his cut slopes were too full. He was asked to "cut his slopes and pull his ditches" and that if he still needed more material, he would have to drag it up off of the fill or borrow at his own expense. He was further told that he could use material from the next balance but that no overhaul would be paid for it. However, the Project Diary of August 22, 1968, states that after material allegedly improperly placed was salvaged, the balance was "way short," and that the Bureau would have to pay for borrow.⁵⁵

PHL hauled an estimated 3,000 yards of material across the balance point from the cut at 247+50 to 249+92 to the fill at 264+00 to 267+00 (Project Diary of August 21, and 22, 1968). This, of course, was beyond the free haul distance⁵⁶ and would appear to involve more than finishing material.

⁵⁵ Nevertheless, when Mr. Lyshaug inquired whether any allowance for borrow for finishing had been made in the monthly estimate, he was told no because the Bureau wouldn't pay for borrow where material was wasted (Project Diary of September 7, 1968). When Mr. Lyshaug denied wasting material suitable for finishing Mr. Bilderback responded that PHL had filled in a hole one-and-a-half to two feet by 200 to 300 feet with material conserved for finishing. Accepting the larger of these figures and two feet for the missing dimension, the maximum amount of material involved would be less than 45 cubic yards. This assumes the material was suitable for finishing which has by no means been established.

⁵⁶ The Project Diary of August 22, 1968, states that Propes and Lyshaug agreed that 450 yard-miles involved was about equal monetarily to the 150 or 200 yards of material beyond the roadway prism in the fill at 266+00 to 267+00. The record is not clear whether PHL was subsequently paid overhaul on this material.

The project inspector's view that PHL was wasting material suitable for finishing is based upon PHL's failure to complete rough grading operations to Mr. Bilderback's satisfaction, the undercutting of the cuts and the overbuilding of the fills. Although, Mr. Bilderback excused the variation between the estimated and actual excavation quantities upon the ground that this was a "tough, mountain, rock job" (note 38, *supra*), one looks in vain for any recognition of this fact in his interpretation and application of contract requirements during the contract period.

The project inspector was critical of PHL's operations for not being closer to planned grade, for not having more grade checkers and for conducting a "hop, skip and jump" operation. The record indicates that PHL's rough grading operations resulted in a grade from one to two feet below the planned elevations in some areas, as much as three feet too low in at least one cut, and as much as a foot and-a-half too high in some other areas.⁵⁷ Since boulders of from two to eight feet in diameter were excavated and placed in the fills,⁵⁸ and since there was a short-

⁵⁷ See Project Diaries of July 25, August 5 and 7, September 2 and 5, 1968, and July 16, 28 and 31, August 1, 4, 6, 12 and 25, 1969. Most of the low areas are stated to be due to "undercutting." One of the high areas (fill at station 134) was attributed to placing boulders six to eight feet in diameter which had to be repositioned, while another of the high areas (stations 158 to 162) was attributable to placing of boulders and to the fact the area was not staked because it was under three feet of water (Project Diaries of July 16 and 28, 1969).

⁵⁸ Tr. 126, 136, 292; Project Diaries of September 16, 1968, and July 16, 1969.

age of finer materials, it is hardly surprising that such variations could occur in the course of the work. Mr. Propes testified that under such conditions he did not know any way of coming out on grade without select material (Tr. 345). There is evidence that some of these variations are due to staking errors (Tr. 264, 265, 274, 275; Project Diary of September 13, 1968). In this connection, it is not clear what criteria the project inspector applied in determining that the grade was "close enough" so as to warrant the application of material conserved for finishing or borrow.⁵⁹ Mr. Lyshaug testified that "* * * you like to bring them [fills] up to within 6 inches more or less of final grade so you can have a continuity (sic) through the job." (Tr. 228.)

The alleged lack of grade checkers and the "hop, skip and jump" operation are closely related. Mr. Lyshaug insisted that PHL did have grade checkers, but asserted that since they were forced to spread out all over the area, they could not have a grade checker for each piece of equipment (Tr. 288, 290, 291). Part of the reason for being spread out was as we have seen, the encountering of unanticipated rock. The other reason was the refusal of

the project inspector to permit a balance area to be finished until he determined how the next balance area would come out (Project Diary of August 9 and 12, 1968). Mr. Bilderback admitted directing PHL, particularly during the 1968 season, not to waste material in one balance section until it was determined whether it could be used in the next balance (Tr. 589, 664). We note that under Article 102-1.2 of FP-61 no material from borrow pits was to be placed in the embankment in any balance section until it has been determined that all of the material within the balance section could be utilized in the embankment as planned. Mr. Lyshaug characterized this as a "wait and see" operation and indicated that it was one of the reasons preventing PHL from completing the work in sequence (Tr. 228, 231, 240, 259). We find that this practice was contrary to the contract.⁶⁰

In blasting operations it is normal to drill and shoot below grade in order to avoid rock knobs in the grade (Moving the Earth by H. L. Nichols, App's Exh. 14). Mr. Bilderback readily admitted that this was so (Tr. 663). Mr. Lyshaug admitted to overdrilling approximately two feet (Tr. 292). Mr. Propes testified that it was necessary to drill two feet below ditch

⁵⁹ Testifying with reference to the area between stations 160 and 200, Mr. Bilderback complained: "* * * all of the finishing material, all of the dirt that was on top of the cut section was not conserved. * * * piles of material that was [sic] conserved for finishing were hauled and placed in undercut areas in cuts and fills so that the material in this area that could have been available for finishing was used up in a rough grading process." (Tr. 562.)

⁶⁰ The project inspector apparently considered his actions to be justified by Article 105-1.1 of the Special Provisions which provides that the contractor may be required to haul outside of the designed balance section. However, this was limited to the utilization of "suitable material" and, of course, the haul was not to exceed 1,000 feet.

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line grade in order to finish. He asserted that under such circumstances " * * * you are bound to bootleg under your cut." (Tr. 350.) The contract (Article 102-4.1 of FP-61) appears to recognize this by providing for payment for "unavoidable overbreakage due to blasting of material which would classify as rock, * * *."

The contract required that surplus material be disposed of by widening the embankment or flattening the slopes or as directed by the engineer. (Articles 102-3.2 and 106-3.3 of FP-61.) The record reflects that it was necessary to dispose of large quantities of boulders and surplus rocks by widening the embankment (Tr. 229-231, 262-264, 342-345). Boulders and large rocks were required to be " * * * carefully distributed with the interstices filled with finer material to form a dense and compact mass." (Article 106-3.4 of FP-61.) Mr. Lyshaug testified that in placing rock fills it was necessary to have a certain amount of finish material in order to have a traveling surface (Tr. 258). Although no rolling was required up to 12 inches below finished subgrade elevation, hauling and spreading equipment were required to be operated over the full width of each layer placed.⁶¹

⁶¹ Article 106-3.5 of the Special Provisions. The project inspector appears to have agreed at least mentally with PHL's contention that it was necessary to use dirt and smaller rocks in order to fill holes and voids in and between the larger rocks and boulders. (Project Diary of September 10, 1968). However, there is no evidence that this agreement was communicated to PHL or that he administered the contract with this necessity in mind.

We conclude that the project inspector's criticism of PHL's operation for widening the fills and undercutting the cuts ignores the type of material encountered and has not been shown to be justified.⁶²

Notwithstanding the apparent disapproval of his position by his supervisor (note 62, *supra*), the project inspector persisted in his view that PHL wasted usable material and should not be paid for borrow (Project Diary of September 16, 1968). In a conversation on September 26, 1968, the project inspector told Mr. Adams that in most cases they just had to re-arrange what was there and that he (Bilderback) would supply borrow "where needed." (Project Diary.) Some areas off to the side of the roadway from station 204 to 283 in the eastern section, which the project inspector considered suitable, were subsequently designated as borrow sources (Project Diaries of September 27 and 28, 1968). With respect to these areas, Mr. Propes testified that it was difficult to borrow enough material between boulders and stumps for finishing, and the material was duff and loam with rock underneath and that it was an impractical and costly operation (Tr. 336, 337). Even though the project inspector refused to designate an adequate borrow source and

⁶² This was apparently the view of Mr. Bilderback's supervisor, Mr. Remo Minato, since when Mr. Bilderback complained that PHL had wasted material and was borrowing without authorization, he was told by Mr. Minato "go ahead and pay for this borrow." (Project Diary of September 11, 1968.)

even though he admitted to designating some of these areas as possible borrow sources, the findings state that this expensive borrow was accomplished by the contractor on his own without authorization.⁶³

One of these sources, the area between 271+00 and 273+50, was described thusly: "This is the same silt material that we have all over but the moisture content was just perfect." (Project Diary of September 28, 1968.) This is apparently the type of material referred to by Mr. Lyshaug when he testified: "* * * It was basically an organic material. When it was subjected to rain or moisture to any extent it just went to pieces. It didn't have any—it doesn't have any road bearing qualities."⁶⁴ He asserted that the project inspector ignored their protestations that the material was unsuitable. Mr. Adams confirmed Mr. Lyshaug's testimony that the material over the rock was unsuitable when subject to moisture and stated "* * * it didn't have any compac-

tion factor whatsoever." (Tr. 138.) We accept this un rebutted testimony as accurate.

The project inspector was of the view that no borrow was necessary in the area from 160+00 to 200+00 and directed PHL to finish by "cutting high spots and filling low spots" (Project Diary of September 29 and 30, 1968). PHL attempted to do so but was apparently unsuccessful. Despite this and despite his awareness of PHL's letter of September 16, 1968,⁶⁵ the project inspector told Mr. Adams that he did not want to borrow anymore and to "scarify" high spots in this area (Project Diary of October 1, 1968). Thereafter scarifying and grading operations were conducted in this area (Daily Logs of October 1-3, 1968). While scarifying "high spots" is not contrary to the contract, it can in no sense be deemed a substitute for the Bureau's obligation to provide borrow.

We have previously alluded to the testimony of PHL's witnesses establishing a lack of finishing materials in 1968 (note 23, *supra*). The need for borrow in areas from station 174 to the east end of the project was ultimately recognized by the issuance of Change Order No. 1 on June 30, 1969 (Exh. 3). The Justification for Change Order No. 2

⁶³ Findings, par. 129. An illustration of the project inspector's attitude in this regard is that when Mr. Propes inquired where large boulders in the 125+00 to 150+00 area could be placed as the fills were insufficient, he was told there was unsuitable material in the area at station 120 which could be removed and the surplus rocks deposited there. (Project Diary of September 16, 1968.) Yet two days later the project inspector was refusing to pay for 250 yards of material moved in order to dispose of rocks upon the ground it was unauthorized (Project Diary of September 18, 1968).

⁶⁴ Tr. 233. Photos purportedly demonstrating the adequacy of finishing materials on the eastern section of the project appear in Appeal Exhibits 7 & 8 (Gov't's Exh. A). We conclude that the photos support Mr. Lyshaug's testimony that the material was unsuitable when subjected to moisture.

⁶⁵ Exhibit 9. The letter alleged that there was a lack of material suitable for finishing from station 180 in the middle section to station 284. It requested the designation of an adequate borrow source, the establishment of an overhaul price, payment for all borrow furnished to date and that PHL be compensated for all expenses incurred in attempting to obtain suitable material.

states that an estimated 8,000 cubic yards of borrow were necessary to complete the project of which 6,000 yards were beyond the free haul distance. The mass diagram (App's Exh. 2) indicates that approximately 16,000 cubic yards of borrow were utilized in the area from station 160 in the middle section eastward to the end of the project. As noted previously, it does not appear how much of this was beyond the free haul distance. This figure would undoubtedly have been substantially higher except for the intransigence of the project inspector⁶⁶ and grade changes.⁶⁷ While the findings (par. 123) assert that these changes were for the benefit of PHL, we find that the real reason for the grade changes was to adjust the design to actual conditions⁶⁸ and so the Bureau would not have to pay for additional borrow (Tr. 256; Project Diary of June 19, 1969; App's Exh. 13).

The record is clear that PHL

⁶⁶ Notwithstanding his recognition that some borrow would be necessary from station 214 eastward, the project inspector refused to buy borrow until the rock piles were placed, ditches and slopes were "pulled", and all cuts were finished (Project Diaries of July 25, and 30, 1969). While this may have been a reasonable position under Section 107 "Finishing—Roadbed", it cannot be justified under Section 102 when sufficient quantities of suitable materials are not available.

⁶⁷ It appears that the grade changes in the area from stations 158 to 162 in the middle section and from approximately stations 230 to 247 in the eastern section were substantial (a foot or more) while the changes in the remainder of the area between stations 160 and 274 varied from two tenths to three tenths of a foot (Project Diaries of September 11, 12 and 20, 1968, and July 28, 1969; App's Exh. 13).

⁶⁸ For example, Mr. Lyshaug testified that the grade change across the pond in the 160 area was " * * *, to get out of the water." (Tr. 276.)

made considerable efforts to conserve finishing material (Tr. 125, 140, 203; photos, pp. 8, 9, App's Exh. 4). We find that these efforts were reasonable under the circumstances.

Messrs. Adams, Lyshaug and Propes denied that there was excess waste on the project or that material suitable for building fills or finishing was wasted.⁶⁹ Mr. Bilderback acknowledged that he contemplated saving the overburden for finishing (Tr. 649, 650). We have accepted as accurate the testimony to the effect that this material was largely unsuitable.

DECISION

The Government was clearly obligated to designate borrow sources if sufficient quantities of suitable materials were not available from roadway excavation as planned. That sufficient quantities of suitable material was not available is established by the record and was ultimately recognized by the issuance of Change Order No. 2 and in the justification therefor. The claim is for the additional expenses incurred in attempting to obtain finishing materials prior to the issuance of the Change Order.⁷⁰

The Government defends the claim upon three grounds: (1) PHL made an inadequate site investigation; (2) PHL did not complete suf-

⁶⁹ Tr. 140, 261, 352. We agree with Mr. Adams' testimony to the effect that some wasting is inevitable (Tr. 140).

⁷⁰ PHL appears to have been paid for all measurable and agreed borrow excavation.

ficiently long sections of the roadway in 1968 to make finishing feasible; and (3) PHL wasted finishing material in rough grading operations and in the bottom of fills. (Posthearing Brief, pp. 20-22.) Only the latter of these reasons warrants more than a brief discussion.

The relationship between PHL's allegedly inadequate site investigation and the shortage of suitable material for finishing is not clear. Presumably, if appellant had realized that this was a "scratch job" requiring extensive drilling and blasting, it would have substantially increased its bid price to cover the costs of obtaining finishing materials regardless of the methods required in obtaining such materials or would have taken extraordinary efforts to conserve finishing materials. Be that as it may, we have previously rejected the contention that PHL's site investigation was inadequate and our reasons for doing so will not be repeated here.

We find no merit in the contention that sufficiently long sections of the roadway were not completed in 1968 to make finishing feasible. In the first place, we think the argument misconstrues the contract. Although the Government's obligation to designate suitable borrow sources under Article 107-3.1 might be said to arise only after the roadway has been "substantially completed," the obligation under Article 102-1.2 is not so limited, but arises at any time "sufficient quantities of suitable materials are not available from road-

way excavation as planned."⁷¹ Obviously, terms such as "substantially completed" and "sufficient quantities of suitable materials" are not precise, but are matters of judgment which are to be tested by the standard of reasonableness.⁷² As we have already noted, the Government ultimately recognized that sufficient quantities of suitable materials were not available by the issuance of Change Order No. 2 and in the justification therefor.

Secondly, the Government's present position that finishing was not feasible in 1968 is clearly an afterthought since the project inspector did not give this as a reason for refusing to designate borrow sources when PHL repeatedly requested that suitable borrow be provided in August and September of 1968. As we have seen, the project inspector's reasons for refusing to provide borrow in 1968 were that PHL had wasted usable material or that the roadway could and should be finished with available material.⁷³

We turn to the Government's final and most serious contention, *i.e.*,

⁷¹ The record is clear that it was not practicable to obtain additional roadway excavation by widening cuts or flattening cut slopes, an option permitted under Article 102-1.2 in lieu of borrow. It is of interest that Mr. Bilderback cited this provision in an effort to refute PHL's assertion that no provision for borrow was contained in the contract. (Tr. 555, 556.)

⁷² "It has been stated—and we think rightly so—that the reach of general language in a Government specification must be determined perforce by resort to the test of what is reasonable." (Footnote omitted.) *Compec* (A Joint Venture), IBCA-573-6-66, 75 I.D. 1-8 at 4 (1968), 68-1 BCA par. 6776 at 31,336.

⁷³ We note that the project inspector was urging Mr. Adams to get some finishing work accomplished as early as July 16, 1969 (Project Diary of even date). Since substantial work on

that PHL wasted finishing material in rough grading operations and in the bottom of fills. Article 102-3.2 of FP-61 as modified by the Special Provisions provides in effect that where feasible large pieces of coarse rock and boulders shall be placed in lower sections of the embankment thereby conserving the more suitable excavation material for the top portion of the subgrade. This Article also provides " * * * material encountered in cuts and deemed suitable for placing in the roadbed or for topping or for road finishing shall be saved and utilized for those purposes as directed by the engineer. * * * The contractor shall not borrow nor waste material without approval by the engineer."

Unlike *Morrison-Knudsen* (note 52, *supra*), the record in this case establishes that PHL representatives were requested on several occasions to save "finishing dirt." This, of course, may afford a basis for distinguishing *Morrison-Knudsen* from the instant case. However, it does not end the inquiry since we conclude that the obligation to conserve finishing material is not absolute but must be measured by what is reasonable under the circumstances (note 7, *supra*). We note that large boulders and coarse rock are to be placed in lower sections of the embankment "where feasible" and that material "deemed suitable" for placing in the roadbed or for

finishing shall be saved and utilized for such purposes as directed by the engineer. Although the engineer obviously has a wide discretion in such matters, we think it equally obvious that such discretion is not unlimited but is subject to the bounds of reasonableness. By the same token, the engineer's approval to waste or borrow may not unreasonably be withheld.

We have found that the project inspector's criticism of PHL's operation for not being closer to grade, for "undercutting" and overbuilding the fills ignores the amount of rock encountered and the size of the boulders which had to be placed in the embankment, disregards normal and usual practice in drilling and blasting and overlooks certain of the project inspector's own directives which had the effect of preventing the roadway from being completed in sequence. We have, also, found that substantial quantities of the "overburden" on rock which the project inspector wanted saved for finishing were not suitable for such purpose and that PHL made efforts, reasonable under the circumstances, to conserve material for finishing. In addition, the project inspector failed to sufficiently recognize the contract requirement that finer materials be utilized in incorporating the rocks and boulders into the embankment to form a dense and compact mass.

In view of the foregoing findings, we have no hesitation in concluding that what was designed as a "scratch job" was made even more

the project during the 1969 season did not get underway until July 9, it is unlikely that there had been a sufficient change in the status of the project so as to suddenly make feasible that which was previously not feasible.

so by the Government's administration of the contract and that the directives to "rearrange what was there" and in effect requiring PHL to "scrounge around" for finishing material effected a constructive change to the contract entitling PHL to an equitable adjustment.⁷⁴

Conclusions:

The appeal is sustained and the matter is remanded to the contracting officer for negotiation of the amount due in accordance with this opinion.

SPENCER NISSEN, *Member*.

WE CONCUR:

RUSSELL C. LYNCH, *Member*.

WILLIAM F. MCGRAW, *Chairman*.

RUTH E. HAN

13 IBLA 296

Decided *October 31, 1973*

Appeal from decision by District Manager, Bureau of Land Management, Malta, Montana, rejecting a grazing lease application.

Affirmed.

Grazing Leases: Generally—Grazing Leases: Preference Right Applicants

An owner of lands contiguous to federal lands is not a qualified applicant for the purposes of a section 15 grazing lease preference application when the nonfed-

eral lands, which are the basis of the preference, have been leased to another party who has complete control over the livestock operation conducted thereon.

Administrative Practice—Contracts: Generally—Courts—Grazing Leases: Applications

Remedies for alleged breach of a private agreement between parties who have conflicting grazing lease applications must be sought in the courts, not in the Department of the Interior, which has no jurisdiction over such matters.

Grazing Leases: Applications—Grazing Leases: Preference Right Applicants

As the regulations pertaining to section 15 grazing leases now provide that a qualified applicant is one who is in the livestock business and has a need for the grazing use of the federal land, an applicant who owns lands contiguous to federal land but fails to show she is in the livestock business and needs the federal land for grazing purposes is not qualified, and her application is properly rejected for that reason.

Grazing Leases: Generally—Rules of Practice: Appeals: Hearings—Rules of Practice: Hearings

An applicant for a section 15 grazing lease has no statutory or regulatory right to a full evidentiary hearing before an administrative law judge; a hearing on issues of fact may be ordered by this Board in its discretion, but a hearing will not be ordered where the applicant does not allege the existence of facts which, if proved, would entitle her to the relief sought.

⁷⁴ It is, of course, well settled that erroneous or unreasonable interpretations of contract requirements which cause a change in the contractor's method of performance and increase its costs constitute constructive changes. *Lincoln Construction Company*, IBCA-438-5-64, 72 I.D. 492 (1965), 65-2 BCA par. 5234.

Winchester Land and Cattle Company, 65 I.D. 148 (1958), and E. W. Davis, A-29889 (March 25, 1964), no longer followed in part.

APPEARANCES: Richard M. Han, for appellant.

OPINION
BY MRS. THOMPSON
INTERIOR BOARD OF
LAND APPEALS

Ruth E. Han has appealed from a decision by the Malta, Montana, District Office of the Bureau of Land Management, dated January 24, 1973, which rejected her grazing lease application in its entirety, on the basis that she was not a qualified applicant; the decision granted the conflicting application of Robert Darlington, whom the District Office found to be a qualified applicant. The applications were filed for leases under authority of section 15 of the Taylor Grazing Act, *as amended*, 43 U.S.C. § 315m (1970).

The lands in conflict comprise about 2,500 acres in Chouteau County, Montana. To briefly review the recent use of these lands, we note that on February 6, 1960, a 10-year grazing lease was issued to Mrs. Han on the basis of an application indicating ownership of 200 cattle. In 1966 or 1967, however, the Han cattle were sold. After two years of non-use the use of the lease was sublet to another party.

When the 10-year lease expired, applications were accepted and portions of the lands originally leased by Mrs. Han were leased to Mr. Darlington, the owner of neighboring preference lands, and to a third party. Although Mrs. Han then had

no livestock, Mr. Darlington's application for the remainder of these lands was rejected and Mrs. Han, because of her historical use and the more integral relationship between her preference lands and the section 15 lands, was given four months either to re-enter the livestock business or lease her preference lands to a qualified applicant.

Within four months Mrs. Han leased her preference lands to Mr. Darlington for a two-year period. She then executed an assignment of her federal lease¹ to Mr. Darlington as well, with the assignment of the federal lands to expire at the end of 1972 along with the lease of her preference lands.

Negotiations failed to produce a signed renewal of the private land lease, so it and the federal grazing lease expired October 30, 1972. Thereafter, applications were accepted for a new lease to the federal acreage involved; Mr. Darlington and Mrs. Han were the only applicants. In the decision being appealed, Mr. Darlington was granted a lease for the acreage, and Mrs. Han's application was rejected because her application showed she controlled only two horses. The District Manager determined she was not a qualified applicant under 43

¹ While Mrs. Han controlled her preference lands at this time, she had no livestock. Thus, the granting of the lease under these conditions was based on the assertion in her application that she would take in livestock on gain or shares, as well as historical use and the potential isolation of some of her base lands if someone else controlled the federal lands. The validity of this lease is not at issue here.

CFR 4121.1-1(a), which requires that the applicant be engaged in the livestock business, have a need for the grazing use of the land, and be a citizen of the United States.

Mrs. Han's appeal does not assert that she is actually in the livestock business or that she has a need for the grazing use of the land. The appeal indicates in this regard only that her ranch has greatly depreciated in value because of the decision. Her appeal also asserts that her application was unjustly rejected because Mr. Darlington failed to file (and sign) the extension of their private land lease agreement. She requests a hearing for the purpose of reversing the decision and granting her application.

Mrs. Han's argument is apparently based on the assumption that the lessor of preference lands, on which the lessee is conducting a livestock business, is in control of these preference lands for the purpose of a section 15 lease application. Only under such an assumption would the failure of Mr. Darlington to sign and file the renewal lease affect her status as an applicant for a section 15 lease.

However, this argument is based on a misunderstanding of the regulations governing section 15 applications. Regulation 43 CFR 4121.2-1(c) (1) states that priority in issuance of leases will be granted to "qualified applicants * * * who are the owners, lessees, or other lawful occupants of contiguous private lands * * *." In order, however, to be a qualified applicant one must,

inter alia, be engaged in the livestock business. In *Orin L. Patterson*, 56 I.D. 380, 381 (1938), the Department construed section 15 of the Taylor Grazing Act to "contemplate the awarding of preference rights not merely to owners but owners who are occupying and using the contiguous lands for the grazing of livestock." The decision went on to hold that the lessees who ran the grazing operation on the private lands were the parties entitled to a preference right to the contiguous federal lands. *Id.*

43 CFR 4125.1-1(i) (4) partially codifies this rule:

The grazing lease will be terminated in whole or in part because of loss of control by the lessee of non-Federal lands that have been recognized as the basis for a grazing lease.

Thus, the phrase "lawful occupant of contiguous lands," as used in section 15, does not include the owner of such lands who has divested himself of control over the grazing operation on such lands. *Laurence A. Andren*, 7 IBLA 14 (1972).

The lease of preference lands involved here does not contain a clause specifically regulating the lessor's right of possession or entry, but appellant did relinquish control over the grazing operation and waive any liability for accident or loss to livestock, personnel or equipment occurring on the leased lands. A lease under such terms amounts to divesting oneself of control of the land for section 15 purposes. *Laurence A. Andren, supra*. Thus, if the lease of her private lands had been renewed

on the same or similar terms, Mrs. Han would not have been a qualified applicant for this reason.

If Mrs. Han feels that Mr. Darlington breached an oral agreement to renew the preference lands lease through "fraud or inadvertence or neglect," as contended in her appeal, she has chosen the wrong forum. Remedies for alleged breaches of private agreements must be sought in the courts, not this Department. Such matters are not within the jurisdiction of this Department. The proper function of this Department is to ascertain whether an applicant, such as Mrs. Han, meets the applicable statutory and regulatory requirements. Although Mrs. Han owns lands contiguous to the federal lands, she has failed to show, or even to allege, that she is in the livestock business and has a need for the grazing use of the land as required by 43 CFR 4121.1-1(a). We note that two decisions of this Department, *Winchester Land and Cattle Company*, 65 I.D. 148 (1958), and *E. W. Davis*, A-29889 (March 25, 1964), emphasized the necessity for applicants to show need for the public land to entitle them to a preference right for a section 15 grazing lease. They are correct in that regard. To the extent they indicated an applicant need not be in the livestock business to be qualified as an applicant for a lease, however, they are no longer controlling precedent. The regulations then did not provide, as they now do, that a person be engaged in the livestock business. Compare 43 CFR 160.3(a) (1954) with 43 CFR 4121.1-1(a) (1972).

Therefore, the District Manager correctly rendered his decision on the basis of Mrs. Han's failure to show that she was a qualified applicant.

Mrs. Han's appeal also requests a hearing. This appeal has afforded her an opportunity to show error in the District Manager's decision. There are no statutory or regulatory procedures providing for a full evidentiary hearing before an administrative law judge as a matter of right for section 15 grazing lease applicants, although the regulations provide such a right to section 3 applicants. 43 CFR 4.470. However, under the general procedural regulations any party to an appeal may request, and the Board *may*, in its discretion, order a hearing to take evidence on an issue of fact. 43 CFR 4.415. Such a hearing is ordered only if there is a sufficient basis for doing so.

A person requesting a hearing must at least allege the existence of facts which, if proved, would entitle her to the relief sought before a hearing will be ordered. *Clark Canyon Lumber Company*, 9 IBLA 347, 80 I.D. 202 (1973); *Elaine S. Stickelman*, 9 IBLA 327 (1973). Appellant has failed to do so here. She has not alleged or offered to show that she is in the livestock business and needs the federal lands for grazing purposes. To be a qualified applicant for a grazing lease, such facts must be shown. The matters she has raised concerning attempts to lease her own lands to Mr. Darlington are not relevant. As we have discussed, if she had renewed

her private lease with him, she would have lacked control over her preference lands and would not be entitled to a federal lease in any event. *Laurence A. Andren, supra*. Accordingly, the request for a hearing is denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the District Manager rejecting the application of Mrs. Ruth E. Han is affirmed.

JOAN B. THOMPSON, *Member*.

WE CONCUR:

FREDERICK FISHMAN, *Member*.

NEWTON FRISHBERG, *Chairman*.

JAMES E. SMITH

13 IBLA 306

Decided *October 31, 1973*

Appeal from decision of the Eastern States Office, Bureau of Land Management, rejecting color of title application ES 9782 (Wisconsin).

Affirmed.

Color or Claim of Title: Generally

A color of title application cannot be allowed where the applicant fails to show that the land applied for is public land, *i.e.*, land subject to the operation of the public land laws.

Color or Claim of Title: Generally—Words and Phrases

The term "public land," as used in the Color of Title Act, 43 U.S.C. § 1068

(1970), does not include land purchased by the Government. That term does not include land which has been set aside by Executive Order for the benefit of the Indians.

Color or Claim of Title: Applications

A color of title application embracing land occupied by one purportedly claiming under color of title, but who does not establish that the land in issue was conveyed to him by an instrument which, on its face, purported to convey the land in issue, is not allowable, since color or claim of title is not demonstrated.

APPEARANCES: Harold Witkin, Esq., Davis, Witkin, Foley & Weiby, Superior, Wisconsin, for appellant.

OPINION BY FISHMAN INTERIOR BOARD OF LAND APPEALS

James E. Smith has appealed from a decision, ES 9782 (Wisconsin), rendered on March 20, 1973, by the Eastern States Office, Bureau of Land Management, which rejected his color of title application. The application embraced Lot 1, sec. 4, T. 38 N., R. 8 W., 4th P.M., Sawyer County, Wisconsin, containing approximately 47.77 acres. The decision recited in part as follows:

An examination of the record shows that the land described above is not public land and is, therefore, not subject to the provisions of the Color of Title Act.

On November 13, 1885, Mary Bray was issued a restricted fee patent to the subject land. On March 5, 1919, a certificate of competency was issued to Mary Bray (now Perron) providing, among other things, that she had "full power and authority to sell and convey any or all lands above described." The lands described included the lands subject to this decision.

A subsequent chain of title shows that this land was ultimately conveyed by warranty deed dated January 1, 1938, from Sawyer County, Wisconsin, to the Bureau of Indian Affairs. The land is still under the jurisdiction of that agency or a part of the Lac Court Orieles Indian Reservation.

Therefore, the land is not under the jurisdiction of the Bureau of Land Management and the subject application is hereby rejected.

Appellant on appeal asserts that he has been the sole occupant of this property since 1930, and has worked and cultivated at least 17½ acres since that time without objection or questions ever being raised.

Executive Order 7868 of April 15, 1938, affecting the land in issue, stated in pertinent part as follows:

*** [J]urisdiction over the lands *** together with the improvements thereon *** is hereby, transferred from the Secretary of Agriculture to the Secretary of the Interior *** and the Secretary of the Interior is hereby authorized (1) to administer, through the Commissioner of Indian Affairs, such lands for the uses for which they were, or are in the process of being, acquired, and, insofar as consistent with such uses, for the benefit of such Indians as he may designate ***.

The threshold question presented by the case is whether the lands in issue constitute public lands of the United States subject to disposition within the purview of the Color of Title Act, *as amended*, 43 U.S.C. §§ 1068, 1068a, 1068b (1970). We stated in *Donald E. Miller*, 2 IBLA 309, 312 (1971), as follows:

The words "public lands" are not always used in the same sense. Their true meaning and effect are to be determined by the context in which they are used.

Although it is true that often those words mean such land as is subject to sale or disposition under the general public land laws, and not such as is reserved for any purpose, the term has been applied to reserved lands title to which was in the United States and to which no other party had acquired a vested right. *** (Footnotes omitted.)

Lands acquired by the United States from a county through purchase or other transfer are not public lands. *See Bobby Lee Moore*, 72 I.D. 505, 508 (1965).¹

¹In *Moore*, *supra* at 508-509, the Department stated:

"The distinction between 'public lands' and 'acquired lands' has been the subject of many decisions of the courts and of this Department, and recognition of the difference between them should not at this time present a serious problem. 'Public land is Government-owned land which was part of the original public domain.' *Barash v. Seaton*, 256 F. 2d 714, 715 (D.C. Cir. 1958); *Thompson v. United States*, 308 F. 2d 628, 631 (9th Cir. 1962). 'Public domain' is equivalent to 'public lands,' and these words have acquired a settled meaning in the legislation of this country. "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." *Newhall v. Sanger*, 92 U.S. 761, 763." *Barker v. Harvey*, 181 U.S. 481, 490 (1901). *See Hynes v. Grimes Packing Co.*, 337 U.S. 86, 114 (1949); *Justheim v. McKay*, 229 F. 2d 29, 30 (D.C. Cir. 1956); *United States v. Holliday*, 24 F. Supp. 112, 114 (D. Mont. 1938); *McKenna v. Wallis*, 200 F. Supp. 468 (E.D. La. 1961). "Acquired land," as the term implies, is land obtained by the United States through purchase or transfer from a state or a private individual and normally dedicated to a specific use." *McKenna v. Wallis*, *supra*; *see Barash v. Seaton*, *supra*; *Thompson v. United States*, *supra*; *United States v. Holliday*, *supra*.

"The essential difference between public land and acquired land, then, is not one of use but, rather, one of origin of title in the United States. Land, the title to which was vested in the United States at the time the land became a part of the United States, is commonly known as 'original public domain.' Such land is subject to use, sale, entry, or other disposition under the general public land laws of the United States unless withdrawn or reserved for public purpose. When title to any such land leaves the United States through

It seems clear, therefore, that lands in which the Indians have a beneficial interest, and were acquired therefor, are not public lands of the United States, particularly where such lands have been reserved in connection with an Indian program as was done by Executive Or-

operation of one of the applicable laws, the land ceases to be public domain. It does not follow, however, that upon the reversion of title in the United States to land which once formed part of the public domain the land again becomes public domain. On the contrary.

'It may be stated as a universal proposition that patented lands reacquired by the United States are not by mere force of the reacquisition restored to the public domain. Absent legislation or authoritative directions to the contrary, they remain in the class of lands acquired for special uses * * *. *Rawson v. United States*, 225 F. 2d 855, 858 (9th Cir. 1955).'

"That the public land laws do not apply to acquired lands is well established by an abundance of administrative and judicial decisions. Thus, it has been held that: lands acquired by the United States by purchase under the act of April 8, 1935, 49 Stat. 115; for the purposes of restoration of the range, prevention of erosion, and flood control were not to revert to the public domain and were not subject to grazing use under the public land laws (*United States v. Holliday*, *supra*); lands purchased by the Government with funds appropriated under the act of April 8, 1935, *supra*, designated for administration by the Secretary of Agriculture under the Bankhead-Jones Farm Tenant Act of July 22, 1937, 50 Stat. 522, 525, as amended, 7 U.S.C. §§ 1000 *et seq.* (1964), were not open to location under the general mining laws of the United States (*Rawson v. United States*, *supra*); lands purchased by the United States under the acts of June 7, 1924, 43 Stat. 654, 16 U.S.C. § 569 (1964), and March 3, 1925, 43 Stat. 1133, 16 U.S.C. § 555 (1964), to be administered by the Secretary of Agriculture as national forest lands, were not subject to entry and location under the general mining laws of the United States (*Thompson v. United States*, *supra*); lands acquired by the United States for military purposes were not 'public lands' within the meaning of the Gerard Script Act of February 10, 1855, 10 Stat. 849, and were not subject to selection under the act (*El Mirador Hotel Co.*, *supra*). [60 I.D. 299 (1949)]."

der 7868 of April 15, 1938. *United States v. Schwarz*, 460 F. 2d 1365, 1371-2 (7th Cir. 1972).

Moreover, our examination of the record reveals another fatal defect. In his application for the land, in response to the question "Are you applying for the lands as record title owner?", appellant responded as follows:

I have never received a deed to this land, but have worked it and cultivated it as my own since 1930.

The Board has held that land occupied by one purportedly claiming under color of title, but who does not establish that the land in issue was conveyed to him by an instrument which, on its face, purported to convey the land in issue, is not subject to disposal to that applicant under the Color of Title Act. *S. V. Wantrup*, 5 IBLA 286 (1972). More specifically, the Board has held that a color of title application must be rejected where there is not shown an instrument, which, on its face, purports to convey the land in issue. *Marcus Rudnick*, 8 IBLA 65 (1972). As we said in *Minnie E. Wharton*,²

² *Rev'd. on other grounds*, *United States v. Wharton*, Civil No. 70-106, D.C. Or., February 26, 1973, amended, June 4, 1973, appeal pending. However, in *Day v. Hickel*, 481 F. 2d 473, 476 (9th Cir. 1973), the Court enunciated the principles relied upon in the case at bar, stating:

"As indicated by S. Rep. No. 732, 70th Cong., 1st Sess. (1928), accompanying the bill, the purpose of the Act was to authorize the Secretary to deal with 'cases * * * where lands have been held and occupied in good faith for a long period of time under a chain of title found defective * * *' (Italics added.) No mention was made of cases of possession of land where there was no such chain of

4 IBLA 287, 294-295, 79 I.D. 6, 9-10 (1972):

It is well established that a claim or color of title must be established, if at all, by a deed or other writing which purports to pass title and which appears to be title to the land, but which is not good title. *Peterson v. Weber County*, 99 Ut. 281, 103 P. 2d 652, 655 (1939); * * *.

As was pointed out in *Pacific Coast Co. v. James*, 5 Alaska 180, *aff'd*, 234 F. 595 (1916), "[o]ne cannot make his own title."

The purpose and intent of the Color of Title Act was to provide a legal method whereby citizens relying in good faith upon title or claim derived from some source other than the federal government, who had continued in peaceful, adverse possession of public land for the prescribed period and had made valuable improvements, or had reduced some part of the land to cultivation might acquire title thereto. *Ralph Findlay*, A-

title. Thus, the history would indicate that there should be excluded from the intent of the Act, land adversely possessed by one who knew that the title was in the United States, but who had no chain of title to it."

* * * * *

"There having been no change in the claim or color of title requirements, it is not an unreasonable interpretation by the Secretary that possession of lands by one who knows the title is in the United States does not constitute a claim of title which is sufficient under the Act. The Secretary's decisions have followed that interpretation. *Lester J. Hamel*, 74 I.D. 125, 129 (1967); *Nora Beatrice Kelley Howerton*, 71 I.D. 429, 434 (1964). In *Howerton*, the Secretary stated:

"Further, even though land may have been occupied, improved, and held by someone else in good faith for more than 20 years under color of title, if a person acquiring the land is aware that title is in the United States, it has been held that he is lacking in good faith and has no right to a patent under the Color of Title Act. *Anthony S. Enos*, 60 I.D. 106 (1948) and 60 I.D. 329 (1949); *Clement Vincent Tillion, Jr.*, A-29277 (April 12, 1963). 71 I.D. at 434."

23522 (February 23, 1943). However, the statute was not intended to provide a means for obtaining a patent by the mere occupation of public land under a mere pretense of title or claim, or a title or claim which the claimant had knowledge or good reason to believe was not a good title. *William Benton*, A-23258 (November 14, 1942). See *Jacob Dykstra*, 2 IBLA 177 (April 22, 1971); *Cf. Hugh Manning*, A-28383 (August 18, 1960).

Appellant asserts a right to the land based upon his adverse possession. It has been held specifically that the adverse possession statutes of the State of Wisconsin do not apply to Indian lands or to lands held by the United States on behalf of Indians. *United States v. Schwarz*, *supra*.

We further stated in *Wharton*, *supra* at 10, that:

* * * An applicant under the Act must show a rationally justifiable reason for believing that he owned the land. See *Myrtle A. Freer et al.*, 70 I.D. 145 (1963).

Appellant has not shown any rational basis for his belief that he owns the land in issue.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

FREDERICK FISHMAN, *Member*.

WE CONCUR:

JOSEPH W. GOSS, *Member*.

EDWARD W. STUEBING, *Member*.

(HAWKS NEST NO. 3 MINE)

July 16, 1973

**IN THE MATTER OF WESTERN
SLOPE CARBON, INC.
(HAWKS NEST NO. 3 MINE)***

2 IBMA 161

Decided July 16, 1973

**Petitions for Assessment of Civil
Penalty.**

**Federal Coal Mine Health and Safety
Act of 1969: Hearings: Procedure**

A hearing instituted by an operator with respect to notices of violation shall not be dismissed on motion by the operator when based upon *National Independent Coal Operators Association et al. v. Morton et al.*, Civil Action No. 397-72 (D.C. Dist. of Col. March 9, 1973), which relates only to the validity of the procedures followed by the assessment officer under 30 CFR Part 100 and does not relate to the hearing procedure pursuant to 43 CFR Part 4.

**INTERIOR BOARD OF MINE
OPERATIONS APPEALS**

**MEMORANDUM OPINION
AND ORDER**

The Board has before it for consideration a ruling certified by Administrative Law Judge Graydon E. Holt filed May 22, 1973, pursuant to 43 CFR 4.591. The ruling arises in the Judge's order, which follows, denying Western Slope's motion to dismiss the above-entitled proceedings:

Following the scheduling of a hearing Western Slope Carbon, Inc., filed motions for dismissal of the above-numbered proceedings. The motions are based on a decision of the U.S. District Court for the District of Columbia, *National Independent Coal Operators Association et al. v. Rogers C. B. Morton, Secretary of the Interior, et al.*, Civil Action No. 397-72, March 9, 1973, in which the Court held that the assessment officer failed to investigate or take into account the criteria required by section 109 of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 3801 *et seq.* (1970). The Bureau of Mines opposed the motions.

Civil Action No. 397-72 relates only to the validity of the procedure followed by the assessment officer under 30 CFR Part 100, and does not relate in any way to the hearing procedure pursuant to 43 CFR Part 4.

The Board is in agreement with the Judge that the ruling certified presents a controlling question of law and that a decision by the Board will materially advance the ultimate disposition of the proceedings below. The Board is further of the opinion that the Judge's disposition of the motions to dismiss were adequate and correct in fact and law.

WHEREFORE, pursuant to 43 CFR 4.591, the Board ACCEPTS the Judge's certified ruling in the above-entitled matter, which IS HEREBY AFFIRMED.

C. E. ROGERS, JR., *Chairman.*

DAVID DOANE, *Member.*

*Not in Chronological Order.

**IN THE MATTER OF RANGER
FUEL CORPORATION
(MINE A, MINE B AND MINE D)***

2 IBMA 163

Decided *July 17, 1973*

Certification of Interlocutory Ruling.

**Federal Coal Mine Health and Safety
Act of 1969: Hearings: Procedure**

A party's right to withdraw a pleading is determined under the rules in effect at the time such right is exercised.

**INTERIOR BOARD OF MINE
OPERATIONS APPEALS**

**MEMORANDUM OPINION
AND ORDER**

On June 14, 1973, Administrative Law Judge (Judge) Paul Merlin denied Ranger's motion to withdraw its request for hearing in the above-listed proceedings and certified his ruling to the Board pursuant to 43 CFR 4.591. That section provides the following:

In making a ruling which does not finally dispose of a proceeding, the Examiner [now Administrative Law Judge] shall at the request of a party or may on his own motion certify his ruling to the Board of Mine Operations Appeals if he determines that such ruling involves a controlling question of law and that an immediate appeal therefrom may materially advance the ultimate disposition of the matter before him.

The Judge concluded that both prerequisites had been met.

*Not in Chronological Order.

Ranger Fuel Corporation (Ranger), after receipt of the proposed assessment, timely filed a request for hearing under the procedure in effect at that time which was set forth in 30 CFR 100.4(i) (1). In response the Bureau of Mines (Bureau) filed a petition for assessment of civil penalty on March 9, 1972. On April 24, 1973, Ranger sent a telegram to the Judge withdrawing its request for hearing as a matter of right under 43 CFR 4.512. At that time the rule provided that "a party may withdraw a pleading at any stage of a proceeding without prejudice." A special appearance to plead withdrawal was entered before the Judge on the following day.

Part 100 of 30 CFR was suspended effective April 24, 1973, and new regulations were instituted to provide that the Bureau shall petition for hearing of penalty cases where payment is not made; however, it was not until May 30, 1973, that 43 CFR 4.512 was amended to provide that a request for hearing in penalty cases may be withdrawn only with the consent of the Bureau.

We believe that a controlling question of law has properly been certified to the Board, a decision on which would materially advance the outcome of these proceedings.

Ruling of the Board

The rights of the parties must be viewed as of the time they were exercised. Ranger's motion to withdraw its request for hearing was

(NAVAJO ALLOTTEE NO. 011358, DECEASED)

November 2, 1973

filed prior to the May 30 amendment of 43 CFR 4.512. We hold that the proceedings effectively terminated on the date of that motion. Even if the proceedings had not terminated at that time, it is a well-established principle of law that an administrative regulation will not be retroactively applied unless its language expressly manifests such an intent and such an application will not result in prejudice or injury. *Greene v. United States*, 376 U.S. 149 (1964), *Sun Oil Company v. Federal Power Commission*, 256 F.2d 233 (5th Cir. 1958), cert. den., 358 U.S. 872 (1958). Since Ranger's right to withdraw was exercised prior to a revision in the rules, the Judge was required to apply the rules in effect at the time Ranger made its motion. *Pacific Molasses Company v. Federal Trade Commission*, 356 F.2d 386 (5th Cir. 1966).

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the certification of the ruling in the above-entitled case is ACCEPTED, and that Ranger's Motion to Withdraw its request for hearing must be GRANTED.

C. E. ROGERS, JR., *Chairman.*

DAVID DOANE, *Member.*

ESTATE OF HAH-TAH-E-YAZZA
(NAVAJO ALLOTTEE NO. 011358,
DECEASED)

2 IBIA 93

Decided November 2, 1973

Petition to reopen.

Denied.

375.1 Indian Probate: Reopening:
Waiver of Time Limitation

A petition to reopen filed more than three years after the final determination of heirs will not be granted unless there is compelling proof that the delay was not occasioned by the lack of diligence on the part of the petitioning party.

375.1 Indian Probate: Reopening:
Waiver of Time Limitation

It is in the public interest to require Indian Probate proceedings be concluded within some reasonable time in order that property rights of heirs and devisees in Indian allotments be stabilized.

APPEARANCES: Dinebeiina Nahiilna Be Agaditahe, Inc., by Richard P. Fahey, Esq., for appellant, Wallace Buck.

OPINION BY MR. WILSON

INTERIOR BOARD OF
INDIAN APPEALS

This matter comes before the Board upon a petition for reopening of probate filed by Richard P. Fahey, Esq., for and in behalf of Wallace Buck, pursuant to 43 CFR 4.242.

The estate having been closed for more than three years the matter was properly forwarded to the Board by Administrative Law Judge Richard B. Denu in accordance with the provisions of 43 CFR 4.242(h).

At the outset it is noted that the petition is being filed some 34 years after the decedent's estate was probated. The decedent, according to the record, died intestate February 28, 1910. Due presumably to lack of communication his death was belatedly reported on or about March 17, 1939, at which time his estate was probated.

In support of his petition to reopen the petitioner alleges that he had no notice of the probate proceedings and that it was only in 1972 that he learned of the decedent's allotment and the proceeding held in connection therewith.

There is nothing in the petition or the probate record indicating any effort on the part of the petitioner over the period of some 33 years to inquire into, or assert any right, or claim he may have had in the estate. Furthermore, there is nothing in the petition or the probate record to indicate the petitioner was under a disability due to minority or lack of competence during the 33 years which would have precluded him from inquiring into or asserting any right or claim he may have had in the estate. Moreover, there is nothing in the petition to show the existence of a manifest injustice resulting from the omission of the petitioner as an heir in the estate.

The Department of the Interior over the years has consistently adhered to a strict policy of refusing to entertain appeals not timely filed. *Estate of Ralyen Rabyea Voorhees*, 1 IBIA 62 (1971). The same policy is applicable to petition for reopening filed beyond the three-year limitation provided in the regulations, *Estate of George Minkey*, 1 IBIA 1 (1970), affirmed on reconsideration, 1 IBIA 56 (1970).

The Board is cognizant and mindful of the Secretary's power under 25 CFR 1.2 to waive and make exceptions to his regulations in Indian Probate matters. However, such authority or power will be exercised only in cases where the most compelling reasons are present. *Estate of Charles Ellis*, IA-1242 (April 14, 1966); *Estate of George Minkey*, *supra*. Reopening of estates will be permitted only where it appears that the petitioner has not been dilatory in seeking his remedy. *Estate of Alvin Hudson*, IA-P-17 (May 29, 1969); *Estate of George Squawlie (Squally)*, IA-1231 (April 5, 1966); *Estate of George Minkey*, *supra*; *Estate of Sophie Iron Beaver Fisherman*, 2 IBIA 83, 80 I.D. 665 (1973).

Moreover, the public interest requires Indian Probate proceedings be concluded within some reasonable time in order that property rights of legitimate heirs and devisees be stabilized. *Estate of Abel Gravelle*, IA-75 (April 11, 1952). To hold property rights of heirs to allotted lands forever subject to challenge, would not only constitute

November 5, 1973

an abuse, but would seriously erode the property rights of those whose heirship in lands has already been determined. *Estate of Samuel Picknoll (Pickernell)*, 1 IBIA 168, 78 I.D. 325 (1971).

It is the finding of the Board that the petition for reopening falls short of meeting the requisite standards or criteria set forth in the above-cited cases and, consequently, does not justify the exercise of Secretarial discretion to waive the three-year limitation contained in 43 CFR 4.242(a). Accordingly, the petition must be denied.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition to reopen filed by William Buck IS DENIED and the order determining heirs entered under date of March 17, 1939 IS AFFIRMED.

This decision is final for the Department.

ALEXANDER H. WILSON, *Member*.

I CONCUR:

MITCHELL J. SABAGH, *Member*.

KINGS STATION COAL CORPORATION

2 IBMA 291

Decided November 5, 1973

Appeal by the Mining Enforcement and Safety Administration (MESA) and the United Mine Workers of America (UMWA) from a decision

dated July 5, 1973 by an Administrative Law Judge declaring null and void *ab initio* an "imminent danger" order of withdrawal in Docket No. VINC 73-206.

Reversed and remanded.

Federal Coal Mine Health and Safety Act of 1969: Hearings: Summary Decisions

An Administrative Law Judge may not issue a summary decision upon his own motion based upon an order to show cause, because the governing regulation, 43 CFR 4.590, requires a moving party.

Federal Coal Mine Health and Safety Act of 1969: Hearings: Summary Decisions

In a proceeding to review an imminent danger withdrawal order, an Administrative Law Judge may not grant summary decision to the applicant where the record is devoid of evidence, there is a general denial of the allegations contained in the Application for Review, and there is a conceivable set of facts which the evidence may reveal which would support the position of the opponent of summary decision.

APPEARANCES: Robert W. Long, Esq., Associate Solicitor, J. Philip Smith, Esq., Assistant Solicitor, I. Avrum Fingeret, Esq., Trial Attorney, for appellant, MESA; Charles L. Widman, Esq., for appellant, UMWA; R. L. Coleman, Esq., for appellee, Kings Station Coal Corp.

OPINION BY MR. DOANE*

INTERIOR BOARD OF MINE
OPERATIONS APPEALS

The Mining Enforcement and Safety Administration (MESA) and the United Mine Workers of America (UMWA) appeal to the Board to reverse a summary decision dated July 5, 1973, on Kings Station Coal Corporation's (Kings Station) Application for Review challenging the validity of the Order of Withdrawal No. 1 JWD issued on December 26, 1972, pursuant to section 104(a) of the Federal Coal Mine Health and Safety Act of 1969 (Act).¹ MESA and the UMWA contend that the Administrative Law Judge (Judge) exceeded his authority under the governing regulation, 43 CFR 4.590, and that the record did not support summary disposition. For the reasons set forth below, we reverse the decision of the Administrative Law Judge and remand the case for further proceedings.

I.

Procedural Background

The withdrawal order in dispute was written by Federal Coal Mine Inspector James W. Daniels and reads as follows:

No. 6 shuttle car right rear wheel was on No. 4 shuttle car trailing cable, 75.606 Protection of trailing cables. No. 6 and No. 4 shuttle cars are operating in the 2nd south Main east. (Exh. A.)

The Application for Review states that at the time the order was issued the No. 6 shuttle car was not in service and was parked in a

break-through with its trailing cable disconnected. Further, Kings Station alleges that the No. 4 shuttle car was fully protected by circuit breaking devices which would have rendered the car inoperable in the event the cable was damaged to the point of failure.

On January 15, 1973, MESA filed its Answer admitting the issuance of the withdrawal order, denying all other allegations in the Application and requesting a dismissal. On January 17, 1973, the UMWA filed its Answer generally denying the allegations in the Application.

On his own motion, the Judge issued to MESA's predecessor, the the Bureau of Mines (Bureau),² a show cause order requiring a statement explaining why summary decision should not be issued. The Bureau replied in substance with three arguments: (1) that an ultimate fact dispute over the existence of an imminent danger had been joined by the pleadings; (2) that the order to show cause improperly shifted the burden of proof; and (3) that the Judge would abuse his discretion in ruling summarily that the withdrawal order was invalid solely upon the Applicant's unsworn pleadings.

The UMWA was not included in the show cause order and apparently was not accorded an opportunity to express its views with respect to the appropriateness or soundness of a summary decision on the basis of the record. The

¹ P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1969).

² Effective July 16, 1973, MESA was substituted for the Bureau in this proceeding. See 38 F.R. 18695 (1973).

UMWA's position appears in its brief on appeal.

On July 5, 1973, the Judge issued a summary decision in favor of Kings Station. He found as fact that the No. 6 shuttle car was disconnected from the power source at the time the order was issued and that the No. 4 shuttle car was fully protected by circuit breakers. Moreover, he found that no imminent danger existed as a result of the condition cited in the order of withdrawal. On the basis of these findings, he concluded as a matter of law that the operator had established a *prima facie* case, that there was no genuine issue as to any material fact, and summarily decided that the inspector's order was null and void *ab initio*.

II.

Issues Presented on Appeal

A. Whether an Administrative Law Judge may issue a summary decision on his own motion.

B. Whether summary decision was warranted by the existing record.

III.

Discussion

A.

In issuing a summary decision, the Judge purported to rely upon the provisions of 43 CFR 4.590³

³ On August 14, 1973, the Administrative Law Judge issued an order correcting the decision of July 5 to read that the order was issued pursuant to 43 CFR 4.590 rather than 43 CFR 4.589(b).

which reads in relevant part as follows:

(b) *Grounds*. A motion for summary decision shall be granted only if the entire record, including, the pleadings, depositions, answers to interrogatories, admissions and affidavits, shows (1) that there is no genuine issue as to any material fact and (2) that the *moving party* is entitled to summary decision as a matter of law. (*Italics added.*)

Both the UMWA and MESA contend that the existence of a moving party is a condition precedent to the issuance of a summary decision under the above-quoted regulation.⁴ We are obliged to agree with them. The regulation, as the quoted portion reveals, indisputably assumes a moving party as a prerequisite to considering the appropriateness of a summary decision on the record. Kings Station, who was the sole beneficiary of the Judge's ruling, never moved for summary decision and indeed specifically requested a hearing in its Application for Review. We, therefore, conclude preliminarily that the Judge did not properly apply the regulation.

In order to avoid the force of Ap-

⁴ Kings Station has argued that this contention may not be raised upon appeal because it was not pressed upon the Judge below. Although the Board is ordinarily reluctant to consider issues not argued below and usually refrains from doing so, it does have the discretion to listen to and rule upon such arguments in an appropriate case. *Buffalo Mining Co.*, 2 IBMA 226, 242, 80 I.D. 630, 636, CCH Employment Safety and Health Guide par. 16, 618 (1973). As the UMWA was never accorded an opportunity to exercise its right to argue below, its contention concerning the Judge's summary decision power is properly before us. Accordingly, we see no reason to refuse consideration to MESA's arguments with respect to a question of law that we must decide in any event.

pellants' contention, Kings Station argues in substance that an Administrative Law Judge has implied power to issue on his own motion a summary decision based upon an order to show cause. As authority for that proposition, Appellee relies principally upon the provisions of 5 U.S.C. § 556 (1970) and 43 CFR 4.505(b), 4.544, and 4.590.

Section 556 of Title 5 is a provision of the Administrative Procedure Act which sets forth the powers of Administrative Law Judges in terms of enormous generality, subject to the rules of the agency involved and within its lawful powers. There is nothing in this statutory section which leads ineluctably to the conclusion that an Administrative Law Judge may upon his own motion issue a summary decision. Section 556 is in reality silent on the matter and, standing by itself, affords no conclusive support for the Appellee's position.

Section 4.505(b) of 43 CFR provides that the regulations promulgated under the Act "shall be liberally construed to secure the just, prompt and inexpensive determination of all proceedings consistent with adequate consideration of the issues involved." Section 4.544 authorizes show cause orders designed to facilitate summary decision in the case of various default situations. As we indicated above, section 4.590 authorizes summary decision in appropriate circumstances pursuant to proper motion. Appellee would have us interpret 4.505(b) to be authority

for lifting out of context and combining the show cause and summary decision powers just described in order to uphold the procedure followed by the Judge in the case at hand.

This argument is quite resourceful, but we must decline to accept it. Section 4.505(b) directs a liberal construction of the regulations, but it does not authorize the Board or the Administrative Law Judges to pick and choose among the provisions of various regulations in order to enlarge authority expressly granted on a *limited* basis. Our interpretation of these regulations is in conformance with a well-known principle of construction stated in the maxim, *expressio unius est exclusio alterius*.

In addition, we must observe that the question of whether the Administrative Law Judges should have the power to proceed as the Judge did in the instant case is a delicate one. The alleged benefit to be derived from expediting cases must be evaluated and balanced against assertions that a violation of due process may result. The resolution of that conflict of competing considerations involves policy decisions concerning administrative proceedings under the Act in general, decisions which we feel properly fall within the sole competence of the rulemaker. We are convinced that if the rulemaker had intended to grant the power under discussion, he would have promulgated an explicit regulation rather than leaving the matter to implication.

November 5, 1973

Therefore, we hold that the Administrative Law Judge had no authority to issue a summary decision on his own motion, and that in so doing, he deprived the parties of their rights to present evidence. See *United Mine Workers of America, Local Union 1520, District 2 v. Rushton Mining Company*.⁵

B.

Both the UMW and MESA argue that, irrespective of the question of who may initiate the summary decision process, which is largely a matter of proper procedure, the Judge erred substantively in concluding that summary decision was warranted by the existing record.

As we indicated in our sketch of the procedural background of this case above, the record confronting the Judge, apart from copies of the subject withdrawal order and the termination order which were appended as exhibits to the Application for Review, consisted of pleadings and argument. There were no affidavits at all.

Despite the denials filed by the UMW and MESA, respectively, the Judge accepted the unsworn and unsupported allegations of fact contained in Kings Station's Application for Review. His findings that the No. 6 shuttle car was disconnected from the power source, that

the No. 4 shuttle car was fully protected by circuit breakers and that there was no imminent danger are not supported by the evidence because there is no evidence in the record at all. While we do not intimate any views as to whether a failure by Kings Station to prove that the No. 6 shuttle car was disconnected and the No. 4 shuttle car was fully protected by circuit breakers would be fatal to its case, that is to say, whether the condition as alleged, if proved, would constitute imminent danger,⁶ we cannot conclude on the basis of the record before us that there is no set of facts which the evidence may reveal which would support conclusions of law upholding the inspector and requiring dismissal of the Application.⁷ Accordingly, we are of the view that the Judge erred in issuing a summary decision in the circumstances before him.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1 (4)), IT IS HEREBY ORDERED that the decision issued July 5, 1973 in the above-entitled case IS REVERSED and

⁵ See *Freeman Coal Mining Corporation*, 2 IBMA 197, 80 I.D. 610, CCH Employment Safety and Health Guide par. 16,567 (1973).

⁷ The practice by nearly all parties has been to file very summary pleadings, leaving the specifics of what is alleged and to be proved to pretrial and hearing proceedings. As a result, it is difficult to hold that there is an appropriate record for summary decision at an early point in time.

⁶ 2 IBMA 39, 80 I.D. 652 (1973), CCH Employment Safety and Health Guide par. 15,465, reconsideration denied, 2 IBMA 55, 80 I.D. 654 (1973).

the case IS REMANDED for further proceedings consistent with this opinion.

DAVID DOANE, *Member.*

I CONCUR:

C. E. ROGERS, JR., *Chairman.*

PLATEAU MINING COMPANY

2 IBMA 303

Decided November 7, 1973

The Mining Enforcement and Safety Administration (MESA) is appealing a decision (DENV 72-69-P) rendered by Administrative Law Judge John R. Rampton, Jr., dated March 28, 1973, which in part vacated Order of Withdrawal No. 1 FWT, dated November 1, 1971, and assessed penalties of \$385 for other violations of the Federal Coal Mine Health and Safety Act of 1969.

Affirmed as modified.

Federal Coal Mine Health and Safety Act of 1969: Hearings: Procedure

An Administrative Law Judge may not vacate an order of withdrawal in a civil penalty proceeding held pursuant to section 109(a) (3).

Federal Coal Mine Health and Safety Act of 1969: Mandatory Safety Standards: Generally

The presence of defective equipment in a working area of a mine is prima facie evidence of the violation of an applicable section of the Act; however, such evidence can be rebutted by the operator, and where he demonstrated by a preponderance of the evidence that the equipment was under repair, and had not been

used, and was not to be operated until it met the required safety standards, no violation of the Act has occurred.

APPEARANCES: William H. Woodland, Esq., on behalf of appellant MESA.¹

OPINION BY MR. ROGERS

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Procedural and Factual Background

On November 1, 1971, during a regular inspection of appellee's Star Point No. 1 Mine, Inspector Fred W. Tatton, observed an Ingersoll Rand portable air compressor in the return entry of 1 south section, about 150 feet outby the last open crosscut between No. 2 and No. 3 entries. In his opinion, the compressor was set up to be used to run an air drill which was attached by an air hose. The stoper (pneumatic drill) was hooked up to the compressor and was sitting near the entrance to the crosscut. The trailing cable to the compressor was stretched out toward the transformer station but there was no plug on the cable with which it could be connected to the power source. Upon that observation, Inspector Tatton issued Order of Withdrawal No. 1 FWT, dated November 1, 1971, which cited the existence of the following conditions:

(1) The metallic frame was not grounded.

¹ Plateau Mining Company, appellee, has not participated in this appeal.

(2) The ground conductor was not continuous for the entire length of the trailing cable.

(3) Proper fillings were not provided where trailing cable and motor leads enter metal compartments.

(4) Trailing cable contained eight temporary splices and several damaged places.

(5) Trailing cable was laying on wet floor and passed through a pool of standing water.

MESA filed a petition for assessment of civil penalties pursuant to section 100.4(i) of Title 30, Code of Federal Regulations, on July 26, 1972. A hearing was held on December 5, 1972; the Administrative Law Judge (Judge) issued an initial decision dated March 28, 1973, in which he found that no violation occurred and, therefore, vacated Order of Withdrawal No. 1 FWT, dated November 1, 1971. The decision also assessed penalties of \$385 for other violations of the Federal Coal Mine Health and Safety Act of 1969.²

Issues Presented on Appeal

1. Whether in a section 109(a) proceeding it is proper for the Judge to vacate an Order of Withdrawal issued pursuant to section 104(a).

2. Whether the Judge was correct in his determination that the presence, in a working area of a mine, of a defective piece of equipment, undergoing repair and not to be used until repaired, is not a violation of the Act.

Discussion

A.

In *Zeigler Coal Company*, 2 IBMA 216, 224, 80 I.D. 626, 630, CCH Employment Safety and Health Guide par. 16,603 (1973), we held that the validity of an Order of Withdrawal is not in issue in a section 109(a) proceeding for the assessment of civil penalties and that it is error for the Judge to either sustain or vacate such Order. Accordingly, the Board finds that the Judge in this case erred when he vacated the Order of Withdrawal.

B.

During the course of the proceeding, the parties stipulated that the conditions noted by the inspector in the Order of Withdrawal were present. On this appeal, MESA has advanced the argument that in view of the Judge's determination that no violation occurred, he ignored the stipulations to its prejudice. MESA also contends that since the Judge accepted the stipulations it could offer no further evidence to establish a violation and that, as a result they are now prejudiced by the lack of such evidence in the record.

In view of our disposition of this case, we do not believe that we are required to decide this issue raised by MESA on this appeal.

We have reviewed the transcript including the stipulations entered into by the parties and have determined, as did the Judge, that under the circumstances no violation ex-

² P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

isted and that it is clear from the record that there is no other evidence, as the issues of fact developed, which could be offered by MESA which would be pertinent to this decision.

We, therefore, hold that the presence of a defective piece of equipment in a working area is prima facie evidence of a violation of the Act; however, such evidence can be rebutted by the operator, and where he demonstrates, as he did, by a preponderance of the evidence that the equipment was under repair and had not been used and was not to be operated until it met the required safety standards, no violation of the Act has occurred.

We are in no way critical of the action of the inspector in issuing the Order of Withdrawal. As we view the transcript, he was not aware of the state of conditions that existed when he issued the Order, nor was the foreman who accompanied him on the inspection, and that the full circumstances were not disclosed until the hearing.

Part of the Judge's decision reads as follows:

There is a *strong inference* raised that it was the intention of the section foreman to use the second compressor without having it comply with the Act. However, *inference alone is not sufficient to establish a violation.* The evidence is clear that the compressor observed by the inspector was never energized or used. No violation occurred and the order is vacated. (Dec. 11, *Italics supplied.*)

We are of the opinion that taken out of context the italicized language of the Judge could create the

impression that he misstated the law and misapplied it in finding no violation. However, we conclude that this was simply an unfortunate choice of language and that the Judge did decide the case correctly. We construe his language to mean that a prima facie case was established by MESA; however, the operator rebutted this showing by MESA, and that accordingly, there was no violation. In other words, there is sufficient evidence in the record to sustain the Judge's findings that the equipment was not intended to be used.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that excepting the vacation of the Withdrawal Order, the initial decision, issued March 28, 1973, in the above-entitled matter IS AFFIRMED.

C. E. ROGERS, JR., *Chairman.*

I CONCUR:

DAVID DOANE, *Member.*

UNIFORM RELOCATION ASSISTANCE APPEAL OF EARL C. MAY

1 OHA 27

Decided November 7, 1973

Appeal from a determination dated April 25, 1973, by the Regional Director of the Southwest Region of the

Bureau of Reclamation, reducing the amount of certain allowable items in a claim for relocation assistance benefits in connection with the acquisition by the United States of Tracts Nos. 4-5-317, 3-20-417 and 2-28-417, Mountain Park Project, Oklahoma.

Affirmed in part and modified in part.

Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970: Uniform Relocation Assistance: Moving and Related Expenses: Moving Expense Allowance

Where qualified persons displaced from their dwelling elect to receive a moving expense allowance under subsection 202 (b) of the Act, the payment is properly based on the schedule established for such purpose by the Bureau head in accordance with moving allowance schedules maintained by the State highway department of the State in which the displacement occurs.

Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970: Uniform Relocation Assistance: Moving and Related Expenses: Payments in Lieu of Moving and Related Expenses: Fixed Payment: Taking of Farm Operation

In computing average annual net earnings of a farm operation for purposes of determining the amount of the fixed relocation payment to which the claimants are entitled under subsection 202(c) of the Act, by reason of displacement from their farm operation, the utilization by the Bureau of a four-year period which is more equitable for establishing such earnings than the two-year period which would otherwise be applicable, will be upheld as a reasonable exercise of the discretionary authority delegated to the

Bureau for such purpose under pertinent Departmental regulation.

In computing average annual net earnings of a farm operation for purposes of determining the amount of the fixed relocation payment to which the claimants are entitled under subsection 202(c) of the Act, charges for use of the lands on a rental basis may not be deducted from net earnings which are reported and recognized for income tax purposes of the owner of the farm operation.

Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970: Uniform Relocation Assistance: Replacement Housing for Homeowners

Where it appears that the replacement housing payment authorized by the Bureau under subsection 203(a)(1)(A) of the Act represents an amount which, when added to the acquisition cost of the dwelling acquired, meets the reasonable cost of the comparable replacement dwelling which is decent, safe and sanitary, and adequate to accommodate the displaced persons, the Bureau determination will be affirmed. In determining such amount, it is proper to add to the total appraisal of the acquired dwelling, the proportionate amount of the total acquisition costs in excess of appraised valuation of the acquired property which is allocable to the acquisition cost of the acquired dwelling.

APPEARANCES: Earl C. May, pro se; Z. P. Sheldon, Acting Field Solicitor of the U.S. Department of the Interior, Amarillo, Texas, for the Bureau of Reclamation.

OPINION BY MS. PATTON
OFFICE OF HEARINGS AND
APPEALS

Earl C. May has appealed from a determination dated April 25, 1973,

by the Regional Director, Southwest Region of the Bureau of Reclamation, which reduced the amount of certain allowable items in his claim, submitted February 9, 1973, for himself and in behalf of his wife, Mary C. May, for relocation assistance benefits under sections 202 and 203(a) of Title II of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§ 4622 and 4623 (1970), in connection with the acquisition by the United States on July 5, 1972, of Tracts Nos. 4-5-317, 3-20-417 and 2-28-417, Mountain Park Project, Oklahoma. The items of the claim and the amounts approved by the Bureau are shown below:

(1) Moving and related expenses in the sum of \$500, representing a moving expense allowance of \$300 and a dislocation allowance of \$200, claimed by the Mays under subsection 202(b) of the Act, by reason of displacement from their dwelling, in lieu of payment of actual moving and related expenses authorized by subsection 202(a) of the Act.

The Bureau determined that the allowable in lieu payment was \$425, comprised of \$225 for moving costs pursuant to Oklahoma's moving schedule for a six-room house, as provided by the Federal Highway Administration, plus the claimed \$200 dislocation allowance.

(2) A fixed payment of the sum of \$10,000, the maximum allowable under subsection 202(c) of the Act in lieu of actual moving and related expenses because of displacement from their farm operation, claimed by the Mays upon the basis of their computation of average annual net earnings of the farm operation in such amount, before income taxes, during the taxable years 1971 and 1972.

The Bureau found that the allowable in lieu payment was \$4,351.55, the average annual net earnings of the farm operation during the period 1969 through 1972 as computed by the Bureau, the said period having been determined by the Bureau to be more equitable for establishing such earnings than the period 1970-1971, the two taxable years immediately preceding the taxable year in which the farm operation moved from the real property acquired for the project, as provided in subsection 202(c) of the Act.

(3) Replacement housing costs totaling \$4,629, claimed by the Mays under subsection 203(a) of the Act, as qualified homeowners displaced from their dwelling, \$4,550 of which represents the difference between an estimated \$7,750 cost of the dwelling and garage on the real estate acquired by the Government and an estimated \$12,300 cost of the replacement dwelling, and the balance of \$79 representing expenses incurred in closing costs incident to the purchase of the replacement dwelling.

The Bureau determined that the total allowable replacement housing costs were \$2,982, made up of a housing differential of \$2,903 (the difference between the \$11,850 allowance for the replacement dwelling and the \$8,947 cost of the dwelling acquired by the Government) and the claimed \$79 in closing costs.

Thus, the Mays' claim for reimbursement for moving and related expenses and for replacement housing costs, in the amount of \$15,129, was reduced by the Bureau to \$7,758.55.

A hearing on the appeal was held on July 25, 1973, in Amarillo, Texas, before Administrative Law Judge William J. Truswell. At the outset of the hearing the Bureau added to the amount approved for payment under item (2) above the

sum of \$356.19 for real property taxes paid by Mr. May, bringing the total in lieu payment allowed for this item, in accordance with the Bureau computation, to \$4,707.74 and the entire amount allowed under the relocation assistance benefits claim to \$8,114.74.

The record shows that the Bureau of Reclamation acquired the above-described tracts comprising the May farm property, situated in Kiowa County, Oklahoma, as well as the improvements thereon, including the six-room dwelling owned and occupied by the Mays, on July 5, 1972. The purchase price was \$120,000. The property had been appraised by the Bureau at \$114,000. Under the terms of the land purchase contract the Mays retained the right to possession of the property until December 31, 1972, and the right to salvage all improvements, including the dwelling, at the appraised salvage value of \$1,400, such sum to be deducted from the purchase price. The contract terms provided also for the Mays' harvesting and retention of crops on the acquired lands, except for a portion required for relocating a railroad, until December 31, 1972. The Mays moved from their farm home into their replacement dwelling in Hobart, Oklahoma, on December 7, 1972. On January 29, 1973, a lease agreement for agricultural and grazing purposes was entered into between the parties, involving 246 acres of the lands, for the period January 1, 1973, through Decem-

ber 31, 1973, with a right of renewal for one year at the option of the lessee, at a rental of \$1,204 annually.

With respect to the reduction of his claim for moving expense allowance, item (1) above, the appellant contends, in effect, that he should be entitled to the maximum moving allowance of \$300, authorized by subsection 202(b) of the Act, because he did the moving himself at a cost less than that of the informal estimate of a commercial mover and he thereby effected a saving for the Government.

The contention is not valid since the law affords no such alternative as proposed by the appellant. He was entitled under subsection 202(a)(1) to the actual, reasonable moving expenses for relocating his family in the replacement dwelling or, under subsection 202(b), to a payment in lieu thereof, made up of a dislocation allowance of \$200 plus moving expenses determined according to a schedule established by the head of the Federal agency, not in excess of \$300. Departmental regulations issued February 9, 1973 (41 CFR Part 114-50, 38 F.R. 3965-3980),¹ in effect at the time of submission of the appellant's claim, and which were promulgated in accordance with guidelines of the Office of Management and Budget,² provide in § 114-50.701-1 that moving allowance schedules maintained by

¹ These regulations were amended on March 16, 1973 (38 F.R. 7116) and on September 10, 1973 (38 F.R. 24649-24650), without change material hereto.

² Circular No. A-103, issued May 1, 1972.

the respective State highway departments should be used as the basis for the schedules of the Bureau or Office concerned. At the hearing the Bureau of Reclamation established that it follows the Federal Highway Administration schedule of moving expense allowances published in the *Federal Register* on September 30, 1971 (36 F.R. 19163), which schedule is based on moving allowance schedules of each State, Puerto Rico and the District of Columbia. The allowance therein set forth for moving six rooms of furniture in Oklahoma is \$225. Accordingly, the in lieu payment was properly determined by the Bureau as \$425.

As to item (2) above, concerning the proper in lieu payment under subsection 202(c) of the Act for displacement from the farm operation, the cited provision of the Act, § 4.6 of the aforementioned guidelines of the Office of Management and Budget, and the Department's implementing regulation in § 114-50.702 authorize a fixed payment in an amount equal to the average annual net earnings of the farm operation but not less than \$2,500 nor more than \$10,000. The term "average annual net earnings" for purposes of subsection 202(c), §§ 4.5 and 4.6 of the OMB guidelines, and Departmental regulation § 114-50.705 in which it is defined, means the average annual net earnings of the farm operation, before Federal, State, and local income taxes, during the two taxable years immediately preceding the taxable year in which

such farm operation moves from the real property acquired, or during such other period as the displacing agency determines to be more equitable for establishing such earnings, and includes any compensation paid by the farm operation to the owner, his spouse, or his dependents during such period.

Record information in copies of the Mays' Federal income tax returns for the years 1970 and 1971 (the two years immediately preceding the year 1972, in which the Bureau acquired title to the real property and the Mays moved therefrom to their replacement dwelling) shows net earnings of the farm operation of \$2,322.12 for the taxable year 1970 and of \$4,701.31 for the taxable year 1971. The Bureau, recognizing that 1970 was a dry year and, therefore, not representative, determined it would be inequitable to use only the years 1970 and 1971 for determining the average annual net earnings of the farm operation. Therefore, and in order that the Mays might have the benefit of the high 1972 net earnings of \$14,291.12 included in the computation, the Bureau prescribed the four-year period 1969-1972 as proper for establishing the average annual net earnings of the farm operation, thus including one year prior and one year subsequent to the two-year period which would otherwise have been applicable. The Bureau added to the figure shown on the tax return as net earnings for 1972 the \$1,204 rental paid in 1972 for the lease year 1973, such item having

November 7, 1973

previously been deducted as an expense of operating the farm in 1972. The Bureau then deducted from the average annual net earnings figure of \$6,453.55 thus arrived at, a charge denoted as a "return to capital land investment" which approximates rental costs for use of the land for the years 1969 through 1972, computed upon the same basis as that used in determining the rental in the lease of the farm lands, namely \$6 an acre annually for croplands and \$4 an acre annually for pasturelands. The net earnings for each of the years mentioned were thus reduced by \$2,102, resulting in the average annual net earnings figure of \$4,351.55 determined by the Bureau as proper for purposes of the in lieu payment.

The appellant, apparently in agreement that the years 1970-1971 should not be used for computation of the average annual net earnings, urges that the period for computing such earnings should be the taxable years 1971 and 1972. He avers in this connection that the 1972 crop year did not end until December 31, 1972, and that, under the contract of sale, he had full possession of the farm operation to that date. He also asserts that he continued farming and retained all farm equipment, cattle, implements and facilities to farm until December 7, 1972, when he held a farm sale of these items. He claims that \$10,867.60 represents one-half of the net earnings of the farm operation during the period 1971-1972, based upon net

earnings of \$4,701.31 in 1971 and \$14,291.12 in 1972.³ Further, the appellant challenges the Bureau's action in deducting from net earnings shown by him in his Federal income tax returns for 1969 through 1972, the charges it assigned for use of the lands equivalent to the rental charges the parties agreed to under the agricultural and grazing lease for 1973.

From the evidence presented it is our view that the Bureau's determination to utilize the four-year period 1969-1972 for computing average annual net earnings of the farm operation was in fact more equitable for establishing representative annual net earnings in the circumstances of this case than the period 1970-1971 which would otherwise have been applicable, and that the time period prescribed was clearly warranted. We, therefore, find that such action was a reasonable exercise of the discretionary authority delegated to the Bureau under the pertinent Departmental regulations for this purpose.

On the issue of the proper computation of average annual net earnings of the farm operation, however, the Bureau erred in deducting from the net earnings, as reported in the Federal income tax returns, charges for use of the lands

³ Including within total earnings in 1972 the sum of \$1,204, representing the lease rental for 1973, a charge paid in 1972, it would appear that one-half of the total net earnings for the years 1971-1972 would be \$10,098.21 rather than \$10,867.60 as claimed by the appellant.

on a rental basis. There is no language in the Act, the OMB guidelines, or the Departmental regulations, which would justify such procedure. The definition of average annual net earnings, noted above, specifically states that the term relates to such earnings "before Federal, state, and local income taxes"—meaning, clearly, such net earnings as must be reported and which are recognized for income tax purposes. From a tax standpoint, a value would not be assigned to the land. The value of an investment in lands is not recognized for Federal income tax purposes and gives the owner no tax benefit until such time as he sells the land. No deduction or amortization is allowed for such a capital investment on the ground that the land is not a depletable asset. Further, for proper accounting purposes, the land is a fixed asset and no allocation is made for the land expense on a yearly basis. Therefore, in the absence of any record evidence which would establish that the net earnings on the Mays' Federal income tax returns for the years 1969–1972 are incorrect, they are accepted as correct for the purposes of this decision and the proper amount of the fixed relocation payment, computed therefrom, is found to be \$6,542.60. This figure takes into account the rental paid in 1972 for the 1973 lease year and the real property taxes of \$356.19.

Concerning replacement housing benefits claimed under section 203 of the Act, the dispute between the

parties relates to the amount of the additional payment allowable under subsection 203(a)(1)(A) to equalize the reasonable cost of the replacement dwelling. The cited subsection, and the implementing regulation § 114–50.801, provide, pertinently, that the additional payment shall include the amount, if any, which when added to the acquisition cost of the dwelling acquired by the agency equals the reasonable cost of a comparable replacement dwelling which is decent, safe and sanitary, and adequate to accommodate such displaced person.

The Bureau's allowance of \$2,903 for the housing differential was determined on the basis of an appraised evaluation of the dwelling acquired by the Government in the amount of \$8,947 and an appraised evaluation for the replacement dwelling of \$11,850. Included in the allowance for the acquired dwelling were these items: house, \$7,500; garage, \$250; water and sewer facilities, \$500; building site, \$250; plus \$447, representing 5.26 percent over the total appraisal. As to the replacement dwelling, the elements were \$12,000 for the house and \$250 for necessary repairs, less \$400, the value of the storm cellar. The record shows that a portion of the value of the farm's water system was assigned to the acquired dwelling unit because the replacement dwelling has water service, that the addition of 5.26 percent to the total appraisal of the acquired dwelling represents the proportionate costs of the specified

items in the total purchase price of the acquired property, and that the \$400 value for the storm cellar of the replacement dwelling was deducted because the purchase price of the house included such amount for the storm cellar and the comparable feature in the farm residence was excluded in the computation of values in that residence. The record shows that the storm cellar in the acquired dwelling was valued at \$1,000. Consequently, it would appear that the Bureau's total allowance was \$600 more than the total of the elements of value thus considered.

Essentially, the appellant objects to the addition of the 5.26 percent to the appraisal figure for the acquired dwelling, asserting that the land alone should bear this increase. However, to acquire the land the Bureau was required to purchase the improvements thereon, including the dwelling, and the Bureau paid \$6,000 over the appraised value of the property to accommodate the Mays and accomplish the purchase. In the circumstances it is our view that the allowable housing differential should properly reflect such percentage increase. Further, the appellant asserts that \$300 should be allowed for repairs to the replacement dwelling rather than the \$250 the Bureau allowed, in order to cover a necessary improvement to the replacement dwelling not previously considered, *i.e.*, the doorway which was cut into the garage so that a deepfreeze could be used. Such deepfreeze had been in the acquired

dwelling but there was no room for it in the replacement housing. This appears to be an authorized element of value; nevertheless, because the total allowance provided by the Bureau is sufficient to cover it, any additional allowance for this item alone would be unwarranted.

Accordingly, the Bureau's allowance of \$2,982 for replacement housing costs is affirmed.

In summary, the determination of the Regional Director of the Southwest Region of the Bureau of Reclamation is affirmed as to items (1) and (3) above and modified as to item (2), as indicated herein. The total amount of the relocation assistance benefits thus allowable under the Mays' claim is \$9,949.60.

This decision constitutes the final administrative determination of the Department in this matter. 41 CFR 114-50.1101-1.

FRANCES A. PATTON,
Special Assistant to the Director.

AMIGO SMOKELESS COAL COMPANY

2 IBMA 310

Decided November 9, 1973

This is an appeal by Amigo Smokeless Coal Company (Amigo) from a Memorandum Opinion and Order issued July 31, 1973, which consolidated for hearing an Application for Review pursuant to section 105 (Docket No. HOPE 72-53) with a proceeding for assessment of civil penalty pursuant to

section 109 (Docket No. HOPE 72-295-P).

Affirmed.

Federal Coal Mine Health and Safety Act of 1969: Hearings: Consolidation

Where, in a hearing on application for review (section 105), both parties agree that the identical contentions of facts and law would be offered in an assessment of civil penalty proceeding (section 109) presently pending, the Administrative Law Judge has the authority to consolidate the proceedings.

APPEARANCES: Raymond E. Davis, Esq., on behalf of appellant, Amigo Smokeless Coal Company; J. Philip Smith, Assistant Solicitor, Madison McCulloch, Trial Attorney, on behalf of Mining Enforcement and Safety Administration.

OPINION BY MR. ROGERS

*INTERIOR BOARD OF
MINE OPERATIONS
APPEALS*

*Factual and Procedural
Background*

At the commencement of hearing on Application for Review in Docket No. HOPE 72-53, the Administrative Law Judge (Judge) determined and the parties agreed that the identical contentions of facts and law and the same evidence would be offered in the assessment of penalty proceeding simultaneously pending in Docket No. HOPE 72-295-P before another Judge. In view of these facts, the Judge consolidated the Application for Re-

view with the penalty assessment proceeding and dismissed the proceeding before him. It is from this action that Amigo appeals and seeks review.

Contention of Amigo

Amigo Smokeless Coal Company argues that it is being denied due process by the refusal of the Judge to proceed under section 105 of the Federal Coal Mine Health and Safety Act of 1969,¹ and that the Company will suffer the possible loss of substantial procedural rights of judicial review by being deprived of a section 105 hearing. Amigo also advances the contentions that while a section 109 proceeding can be consolidated with a section 105 proceeding, the converse is not true and that the provisions of 43 CFR 4.511 are an arbitrary extension of the powers granted to the Secretary by Congress.

Issue Presented

Whether it is proper for an Administrative Law Judge to consolidate an Application for Review pursuant to section 105 with a section 109 penalty proceeding pending before a different Administrative Law Judge.

Discussion

We cannot accept Amigo's argument based upon its interpretation of our decision in *Zeigler Coal Company*, 1 IBMA 71, 78 I.D. 362 (1971), that it is being deprived "of

¹ P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

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its statutory right to litigate under a specific provision of the Act." As we understand the Judge's ruling he merely consolidated the 105 proceeding with the 109 proceeding for hearing purposes. All the rights of Amigo to a full hearing to try the factual and/or the legal issue of the validity of the Withdrawal Order in a 105 application are preserved. Likewise, such action will preserve Amigo's right to a section 106 Judicial Review.

We reject Amigo's contention that the Judge misinterpreted the language of section 109(a) (3) to its prejudice and detriment. This Board cannot envision how Amigo will be denied due process or lose any procedural right of judicial review as a result of the consolidation of the two proceedings.²

Some confusion may arise from the last sentence of the Judge's Ruling and Order, wherein he stated:

It is further ORDERED that Docket No. HOPE 72-53 be and hereby is, DISMISSED.

We believe, however, the Judge intended by that sentence to merely

terminate the proceeding before him rather than to dismiss the docket. We base this belief upon other language of the Judge in his Ruling and Order wherein he stated:

Consolidation of the review proceeding with the penalty proceeding is, therefore, appropriate.

Accordingly it is ORDERED that Docket No. HOPE 72-53 and the issues of fact and law raised therein be consolidated for hearing and determination in Docket No. HOPE 72-295-P.

Since we find no substantive error in the Judge's ruling and disposition of the proceeding, the Board will interpret his ORDER in a manner to effectuate his intent. Thus, we read his dismissal of Docket No. HOPE 72-53 to reflect a termination of that proceeding before him so that it could be consolidated with HOPE 72-295-P.

WHEREFORE, in light of the foregoing, and pursuant to the authority delegated to this Board, IT IS ORDERED that the Judge's Memorandum Opinion and Order of July 31, 1973, in the above-entitled proceeding IS AFFIRMED and the Amigo Smokeless Coal Company, Application for Review, Docket No. HOPE 72-53, IS CONSOLIDATED for hearing with the penalty assessment proceeding in Docket No. HOPE 72-295-P.

C. E. ROGERS, JR., *Chairman.*

I CONCUR:

DAVID DOANE, *Member.*

² We recognize that as a practical matter and in most instances, the proceedings under section 105, because of time limitations, would be the first to be heard and it is appropriate to consolidate with it a section 109 proceeding involving the same facts. Likewise, as in the instant case, when both the section 105 and section 109 proceedings are pending simultaneously before different judges, we perceive no real difference which one is consolidated with the other. We view this as merely a procedural matter within the administrative authority of the Office of Hearings and Appeals to regulate hearings. The result is the same—any issues of fact and/or law common to both proceedings will be tried only one time (see 30 CFR 4.511).

**ESTATE OF MINNIE MAY
RIORDAN (CITIZEN
POTAWATOMI, UNALLOTTED)**

2 IBIA 98

Decided *November 16, 1973*

Appeal from an Administrative Law Judge's decision denying petition to rehear.

Affirmed.

**285.0 Indian Probate: Inheriting:
Generally**

State statutes of descent and distribution as construed and interpreted by the highest court of the state involved will be considered by the Department as controlling in trust heirship proceedings.

APPEARANCES: Law Firm of Buck, Crabtree, Groves and Ransdell by Eric J. Groves for appellants, Maybelle DeWitt Dixon, Bobby Eugene DeWitt, J. B. DeWitt, Mary Kathryn DeWitt Benton and Doyle E. DeWitt, Jr.

OPINION BY MR. WILSON

**INTERIOR BOARD OF
INDIAN APPEALS**

This matter comes before the Board on appeal from an Administrative Law Judge's decision denying petition for rehearing of Maybelle DeWitt Dixon, Bobby Eugene DeWitt, J. B. DeWitt, Mary Kathryn DeWitt Benton, and Doyle E. DeWitt, Jr., identified herein-after as appellants.

Minnie May Riordan, identified hereinafter as decedent, died intestate December 17, 1971.

A hearing was held to determine the decedent's heirs by Administra-

tive Law Judge, John F. Curran, on November 9, 1972. Thereafter, on November 22, 1972 an order determining heirs was duly made and entered by the Judge wherein certain nieces and nephews were found to be her legal heirs to the exclusion of the grandnieces and grandnephews of the decedent, the appellants herein.

The appellants, through counsel, filed a Petition for Rehearing from the Order of November 22, 1972, *supra*. The Judge denied the Petition and affirmed his Order of November 22, 1972.

From the said denial appellants, through counsel, filed a notice of appeal alleging, *inter alia*, as basis for their appeal the following errors of law and fact:

(1) That petitioners, all grandnieces and grandnephews of the Decedent, should be entitled to take by right of representing their predeceased parents.

(2) That the estate in question is an "ancestral estate" and that such fact further qualifies the petitioners to take by right of representation.

(3) That in order for a more uniform and just result in the distribution of this estate, the Petitioners urge a strict interpretation of the statutes of succession.

The foregoing contentions, it is noted, were previously raised by the appellants and were duly considered and rejected in the Judge's order of January 26, 1973 from which the appeal herein was taken.

Having reviewed the record and considered the briefs of the appellants, the Board finds that the appellants have shown no valid or compelling reasons why the Administrative Law Judge's findings

of fact, conclusions of law, and his decision of November 22, 1972 should not be sustained and affirmed.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals, by the Secretary of the Interior, 43 CFR 4.1, the Administrative Law Judge's decision of November 22, 1972, copy whereof is attached, is **HEREBY AFFIRMED.**

This decision is final for the Department.

ALEXANDER H. WILSON, *Member.*

I CONCUR:

MITCHELL J. SABAGH, *Member.*

**ESTATE OF MINNIE MAY
 RIORDAN (DECEASED, CITIZEN
 POTAWATOMI UNALLOTTEE,
 PROBATE NO. IP TU 95P 72)**

2 IBIA 101-A

Decided *November 22, 1972*

This is a proceeding to determine the heirs and to settle the estate of Minnie May Riordan, a deceased Indian, No. Unallottee of the Citizen Potawatomi Indian Tribe.

Upon receipt of the notice of death, a hearing was duly concluded at Shawnee, Oklahoma, on November 9, 1972.

FINDINGS AND CONCLUSIONS based upon the evidence adduced are as follows:

The said Minnie May Riordan whose last residence was in the State of Oklahoma was born 2-10-95 and

died intestate at Norman, Oklahoma, on 12-17-71:

At the date of death the decedent was possessed of that trust or restricted property, real and personal, located on the Citizen Potawatomi Indian Reservation(s) listed on the inventory/(ies) attached, and other reporting documents: and

At death the decedent was survived by certain persons whose respective names, relationships, birth dates, and interests in the estate under the statutes of descent of the State(s) of Oklahoma are as follows:

Ruby M. DeWitt Fox, Citizen Potawatomi Unal., niece, $\frac{1}{4}$

LeRoy DeWitt, Citizen Potawatomi Unal., nephew, $\frac{1}{4}$

Juanita DeWitt Nash, Citizen Potawatomi Unal., niece, $\frac{1}{4}$

Charles DeWitt, Citizen Potawatomi Unal., nephew, $\frac{1}{4}$

A question was raised as to whether the grand nieces and grand nephews, being the children of deceased nephews, were heirs at law of the decedent and entitled to share in the estate. Subsection 6 of Section 213, Title 84, Oklahoma Statutes, 1961, provides that where the decedent leaves no issue, nor husband, nor wife, and no father or mother, or brother or sister, the estate must go to the next of kin. In this case the "next of kin" are the nephews and nieces and not the grand nephews and grand nieces. In the case of *Appeal of Hall*, 102, A. 977, 117 Me. 100, the court held in a similar case that the grand nephews and grand

nieces were not "next of kin" and not heirs at law. The Maine statute on descent and distribution was the same as the Oklahoma statute. The Supreme Court of California in the case of *In Re Nigro's Estate*, 156 P. 1019 (Cal. 1916), likewise held that grand nephews and grand nieces were not "next of kin."

Vol. 4 Page on Wills, Section 34.13 states the rule that "* * * the words 'next of kin' mean the nearest blood relations, and not all those who would take under the statute of distributions. * * *" "Next of kin" means a brother in preference to nephews, sons of a deceased brother; and nieces in preference of grand-nieces."

The attorneys for the grand nephews and grand nieces submitted an excellent brief in arguing that their clients are entitled to share in this estate. However, I believe that this case is controlled by the case of *In Re Humphrey's Estate*, 141 P. 2d 993 (Okla. 1943). In that case the question was whether the "next of kin" were two uncles or whether the "next of kin" were the two uncles and children of deceased uncles. The Supreme Court of Oklahoma held that the two uncles were the "next of kin" and that the children of deceased uncles were not included as "next of kin." Applying that rule here, the nephews and nieces would take as against the children of deceased nephews or nieces.

We, therefore, hold that the grand nephews and grand nieces are not entitled to share in this estate.

The Superintendent or other officer in charge is to collect a probate fee of \$75 pursuant to the Act of January 24, 1923, 25 USC § 372 (1970), assessed on the estimated value of \$788,644.76 of the land and personal property subject to the jurisdiction of this Department.

ORDER

NOW, THEREFORE, by virtue of the power and authority vested in the Secretary of the Interior under sec. 1 of the Act of June 25, 1910, *as amended*, 25 USC § 372 (1970) and other applicable statutes, as delegated (211 DM 13.7; 35 F.R. 12081), IT IS HEREBY ORDERED, that the Superintendent or other officer in charge distribute the estate to the decedent's heirs named in the findings and conclusions herein. The distribution of interests remaining in trust or in restricted status is to be made subject to the burden of payment of the probate fee and to the payment of allowed claims. Those rights of (homestead) (dower) (curtesy) included in the findings and conclusions are recognized, and the interests to be distributed shall be and are subject to the burden thereof.

This decision is final for the Department unless a petition for rehearing is timely filed in accordance with 43 CFR § 4.241 within 60 days from the date hereof as set forth in the notice attached hereto.

JOHN F. CURRAN,
Administrative Law Judge
Tulsa, OK 74101

*November 16, 1973***ESTATE OF LLOYD ANDREW
SENATOR (YAKIMA UNALLOTTED
NO. 124-U2323)****2 IBIA 102***Decided November 16, 1973*

Appeal from an Administrative Law Judge's order denying petition for rehearing.

Reversed and remanded.

**325.0 Indian Probate: Marriage:
Generally—325.3 Indian Probate:
Marriage: Indian Custom**

Indian marriages are based upon the usages and customs of the tribe or tribes involved.

**370.0 Indian Probate: Rehearing:
Generally**

A rehearing will be granted when the record does not support the Judge's findings.

APPEARANCES: Law firm of Hovis, Cockrill, and Roy, for appellant, Pauline Wannasay Senator.

OPINION BY MR. WILSON**INTERIOR BOARD OF
INDIAN APPEALS**

Pauline Wannasay Senator, hereinafter referred to as petitioner, through counsel, the law firm of Hovis, Cockrill, and Roy, has filed with this board an appeal from an Administrative Law Judge's decision denying her petition for rehearing.

The record indicates that the decedent, Lloyd Andrew Senator,

died intestate January 15, 1972. A hearing to determine his heirs was held and concluded October 18, 1972, by Administrative Law Judge Robert C. Snashall. Thereafter, on December 7, 1972, an Order determining heirs was made and entered by the Judge.

In the Order of December 7, 1972, Edith Eli (Senator), among other things, was found to be the surviving spouse and entitled to an undivided one-half share of the decedent's estate.

On February 5, 1973, the petitioner filed a petition for rehearing wherein she alleged that the Judge in his Order of December 7, 1972, was in error in finding Edith Eli the lawful wife of the decedent and not the petitioner.

The Judge, under date of February 15, 1973, denied the petition in the following language:

Petitioner contends Edith Eli Senator was not the lawful surviving spouse of decedent, nor his wife at any time, since "they never intended to be husband and wife nor was there ever any exchange of gifts such as would be required to validate a relationship by Indian custom." The petition evidences a lack of understanding of Indian custom marriages and divorce.

Lloyd Andrew Senator and Edith Eli Senator cohabited together for a period of approximately four years; that during said period there was born to their union three presently living children. Since, stated briefly, an Indian custom marriage consists merely of cohabitation as man

and wife it is inconceivable that anyone could reasonably argue the relationship of decedent and Edith Eli Senator could fail to evidence an intention to live together as husband and wife. *Estate of Charlie Wilson*, Unallotted Pawnee (41345-22). Although it is true many tribes have clearly defined marriage ritual, or have had in the past, no such requirement as exchanging of gifts pertains to creation and existence of an Indian custom marriage within the Yakima Indian nation, 25 CFR 11.28.

The Yakima Indian nation by resolution of December 16, 1953, abolished Indian custom marriage and divorce. Lloyd and Edith Senator formed their relationship prior to such action in approximately year 1952. They separated in approximately 1956 and therefore could have only obtained a divorce by anglicized [sic] means. This they did not do.

Petitioner contends further that she had no notice of the hearing of October 18, 1972. However, she admits in her affidavit filed in connection with the petition for rehearing her "continuing address has been P.O. Box 503, Pendleton, Oregon 97801" which is the address to which notice of said hearing was mailed on September 15, 1972. The notice of hearing was not returned to this office and she is therefore chargeable with constructive notice of said hearing.

In view of the foregoing conclusions the result of this estate would not have been changed if the petitioner had in fact attended the hearing and testified in keeping with the matters contained in her affidavit attached to her petition and rehearing. Likewise, there is no indication that the result might be altered by granting a rehearing at this time.

The petitioner, as basis for her appeal from the Judge's denial of February 15, 1973, alleges as follows:

The basis for this appeal is the erroneous determination by the Department Administrative Law Judge that mere cohabitation is sufficient to establish a "ceremonial marriage" under the Tribal Customs of the Yakima Indian Nation existing prior to 1953. It is the position of Petitioner that the essence of the customs of the Yakima Tribe regarding ceremonial marriages as they existed prior to 1953 was an exchange of gifts between the families and absent such an exchange formally and publicly recognizing and sanctioning the marriage, there was no marriage but only an unsanctioned cohabitation. That an unsanctioned cohabitation was the relationship which existed between Lloyd Andrew Senator and Edith Eli. That after the separation of Lloyd Senator and Edith Eli, Lloyd Andrew Senator was free to marry and did marry your Petitioner in a lawful ceremony performed in Portland, Oregon, pursuant to license and under the laws of the State of Oregon and accordingly your Petitioner is a lawful surviving spouse of Lloyd Andrew Senator and Edith Eli is not.

No brief was filed by the appellees, Edith Eli *et al.*, in answer to appellant's brief.

The only question for determination by this Board is:

Was "mere cohabitation as man and wife" sufficient to constitute a marriage according to the customs of the Yakima Indian Nation prior to December 16, 1953?

The courts have long recognized the validity of Indian custom marriages. See *Cyr v. Walker*, 116 P. 931 (1911); *Buck v. Branson*, 127 P. 436 (1912). It was held in the case of *Cyr v. Walker*, *supra*, at 934:

* * * The courts of the American Union have, from an early time, recognized the validity of marriages contracted between members of any Indian tribe in *accordance with the laws and customs of such tribe*, where tribal relation and government existed at the time of the marriage, and there was no federal statute rendering the tribal customs or laws invalid. * * * (Italics supplied.)

The Department has long likewise recognized Indian custom marriages. *Estate of Noah Bredell*, 53 I.D. 78 (1930). In the Bredell case, the Department said:

Upon careful examination and consideration of the record I find no good reason for disturbing the action heretofore taken in the matter of heirship to the estate of Noah Bredell; and as Congress, the courts, the department, and in many instances the States, have all recognized the validity of *Indian custom marriage* and divorce, it necessarily follows that they must be recognized and treated as being of equal validity with ceremonial marriage and legal divorce. Hence the policy and practice heretofore in this regard are fully justified and should be followed until the enactment by Congress of legislation changing the situation. (Italics supplied.)

In light of the *Cyr v. Walker*, *supra*; *Buck v. Branson*, *supra*; and *Noah Bredell* case, *supra*, and the cases cited therein, it must be concluded that the validity of Indian custom marriages are based upon the usages and customs of the particular tribe involved. In the case at bar the question regarding the va-

lidity of decedent's marriage to Edith Eli cannot be answered as it is not possible to ascertain from the record what the marriage customs of the Yakima Indian Nation were prior to December 6, 1953. Based thereon, we find the Judge's conclusion that a valid Indian custom marriage existed between the decedent and Edith Eli in error. Accordingly, the Order denying petition for rehearing, dated February 5, 1970, must be reversed and the matter remanded for rehearing to determine whether the decedent was married to Edith Eli in accordance with the customs of the Yakima Indian Nation and for the issuance of appropriate findings and decision thereon.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, it is hereby ordered:

1. That the Administrative Law Judge's order denying petition, dated February 15, 1973, IS REVERSED.

2. That the matter herein is REMANDED to the Administrative Law Judge for the purpose, after the parties in interest have been duly notified, of conducting a rehearing to determine the validity of the decedent's Indian custom marriage to Edith Eli and for the issuance of appropriate findings and

decision based upon the evidence presented during said proceedings.

ALEXANDER H. WILSON, *Member*.

I CONCUR:

MITCHELL J. SABAGH, *Member*.

**RYCKMAN, EDGERLEY,
TOMLINSON AND ASSOCIATES,
INC.**

IBCA-992-4-73

Decided November 19, 1973

Contract No. 68-01-0119, Reta Project No. 1024, Environmental Protection Agency.

Denied.

Contracts: Construction and Operation: Allowable Costs—Contracts: Disputes and Remedies: Burden of Proof—Contracts: Formation and Validity: Cost-type Contracts

Where a contractor under a cost-plus-fixed-fee contract gave notice of an impending overrun but proceeded with performance without being advised that additional funds had been provided as specified in the Limitation of Cost Clause in circumstances where the evidence did not establish that the contractor was directed or induced to continue performance, that there was any understanding that additional funds would be provided, or that a change to the contract had occurred, the contractor's claim for overrun is denied on the grounds that the contractor had proceeded with performance at his own risk and that whether additional funds would be provided was within the discretion of the contracting officer.

APPEARANCES: D. W. Ryckman, Sc.D., P.E., President, Ryckman, Edgerley, Tomlinson & Associates, Inc., St. Louis, Missouri for appellant; Mr. Donnel L. Nantkes, Government Counsel, Washington, D.C., for the Government.

OPINION BY MR. NISSEN

*INTERIOR BOARD OF
CONTRACT APPEALS*

This appeal involves an overrun in estimated costs under a cost-plus-fixed-fee contract. Neither party having elected a hearing, the appeal will be decided on the record.

Findings of Fact

The contract,¹ awarded on June 25, 1971, is in the estimated amount of \$42,286, including a fixed fee of \$2,927, and provides for the development of a case study on the total effects of suburban use of pesticides in homes and gardens. General Provisions of the contract include clause three "Limitation of Cost"² and clause four "Allowable Cost, Fixed-Fee, and Payment."

¹ Item 2. References are to the appeal file unless otherwise noted.

² 3. Limitation of Cost

(a) It is estimated that the total cost to the Government for the performance of this contract will not exceed the estimated cost set forth in the Schedule, and the Contractor agrees to use his best efforts to perform the work specified in the Schedule, and all obligations under this contract within such estimated cost. If at any time the Contractor has reason to believe that the cost which he expects to incur in the performance of this contract in the next succeeding sixty (60) days, when added to all costs previously incurred, will exceed seventy-five percent (75%) of the estimated cost then set forth in the Schedule, or if at any time, the Contractor has reason to

November 19, 1973

The performance period was six months from the date of the contract exclusive of the final report, a draft of which was due within 30 calendar days after completion of the period of performance. Periodic reports as to progress made, including the percentage of completion of the project and an estimate of funds expended, were required to be submitted by the 15th of the month following the first full month of contract performance and by the 15th of each month thereafter. Reports for July and August are dated October 7, 1971 (Item 4). The report for August indicates that 25 percent of the work had been ac-

believe that the total cost to the Government for the performance of this contract will be substantially greater or less than the then estimated cost thereof, the Contractor shall notify the Contracting Officer in writing to that effect, giving the revised estimate of such total cost for the performance of this contract.

(b) The Government shall not be obligated to reimburse the Contractor for costs incurred in excess of the estimated cost set forth in the Schedule, the Contractor shall not be obligated to continue performance under the contract or to incur costs in excess of the estimated cost set forth in the Schedule, unless and until the Contracting Officer shall have notified the Contractor by an amendment to the contract that such estimated cost has been increased and shall have specified in such amendment a revised estimated cost which shall thereupon constitute the estimated cost of performance of this contract. When and to the extent that the estimated cost set forth in the Schedule has been increased, any costs incurred by the Contractor in excess of such estimated cost prior to the increase in estimated cost shall be allowable to the same extent as if such costs had been incurred after such increase in estimated cost.

(c) If, (1) the Contractor stops performance before completion of all work hereunder because it has incurred costs in the amount of or in excess of the estimated cost set forth in the contract, and (2) the Contracting Officer elects not to increase such estimated costs, the Contractor's fixed-fee will be equitably reduced to reflect the actual amount of work performed as compared with the full amount of the work

completed and that 14 percent of the budget had been expended.³

The report for September, dated October 15, 1971 (Item 4), states that 35 percent of the work has been accomplished and 19 percent of the budget expended, exclusive of \$1,999.60 attributable to labor costs, of Dr. R. von Rumker (note 3, *supra*) through August 31, 1971. Modification No. 1, dated October 18, 1971, amended the work statement to provide that references to Washington, D.C. and St. Louis, Missouri, were deemed to denote instead Philadelphia, Pennsylvania and Lansing, Michigan.⁴ The modification states that there will be no increase in total estimated cost, fixed fee or performance period as a result of the change.

The October report, dated November 12, 1971, states the level of accomplishment is 57 percent and that 55 percent of the budget has been expended. With respect to Task C, "Transport Mechanisms," the report states in part: " * * * The

required in the contract. In the event of failure to agree as to the amount of such reduction, the Contracting Officer shall determine the amount, subject to the right of the Contractor to appeal therefrom pursuant to the clause in the contract entitled "Disputes." This paragraph shall not, in any way, limit the rights of the Government under the clause in the contract entitled "Termination for Default or for the Convenience of the Government."

³ This is stated to be exclusive of labor costs attributable to a Dr. R. von Rumker, who was apparently employed as a consultant by appellant specifically for performance of this contract.

⁴ Although the work statement in the contract refers to "the study area," these references are not in the contract as such but were apparently in appellant's proposal (No. RETA 1024-D, dated May 7, 1971) incorporated into the contract by reference. The proposal is not in the record.

topography of the Philadelphia area creates many sewage drainage basins and little information is obtainable about run-off rates and rainfall. The RETA effort is being expanded to look for the availability of this type of information." As to Task D, "Impact of Pesticides on Water Environment," the report includes the following: "A paucity of information on standing bodies of municipal water (whether recreational or reservoir storage) has created some problems. We have decided to enlarge the scope of study on this type of water for comparative purposes." The report refers to efforts to document the effects of pesticides on streams in the Dallas area and states that "Additional cities are being surveyed to support this kind of data."

The November report, dated December 13, 1971, states the level of accomplishment is 76 percent and that 90 percent of the budget has been expended. The report refers to a "mid-term progress report," dated October 22, 1971 (not in the record) and to subsequent communications wherein EPA was advised that the budget expended exceeded the level of accomplishment by ten to 15 percent. The report states that Mr. Tirella, Director of Finance and Administration, has contacted Mr. Phillips, EPA contract specialist, concerning this matter.

In a letter, dated December 17, 1971 (Item 3e), appellant confirmed a phone conversation of December 13, 1971, wherein Mr. Phillips, EPA contract specialist, was ad-

vised that a cost overrun would be incurred on the contract. The letter pointed out that the original cost estimates were made approximately nine months ago, that the scope of the work was refined in a meeting with EPA representatives on October 13, 1971,⁵ and states that in order to complete the project the estimated cost would have to be increased by \$9,817, consisting of \$4,415 in direct labor, overhead at the provisional rate of 113.3 percent of direct labor (\$5,002) and travel (\$300), and subsistence (\$100) totaling \$400. The letter includes the following: "Therefore, RETA had to increase its level of effort in order to collect a credible data base." Mr. Phillips, the contract specialist, replied by letter, dated December 29, 1971 (Item 3d), reminding appellant of the Limitation of Cost clause and cautioning appellant not to exceed the estimated cost of \$39,359, exclusive of fixed fee.

Appellant's report for December 1971, dated January 10, 1972, indicates that 115 percent of the budget has been expended while the level of accomplishment was 96 percent. A draft of the final report was apparently filed on January 31, 1972 (RETA letter, dated May 8, 1972, Item 3b). No question has been raised as to its adequacy.

In a letter dated February 10, 1972 (Item 3c), Mr. Phillips replied further to appellant's letter of December 17, 1971, concerning the

⁵ This meeting is described in the report, dated November 12, 1971, as " * * * a fruitful discussion with a good exchange of information and many questions resolved."

cost overrun. It was pointed out that no additional funding was requested at the time Modification No. 1 to the contract was issued in October of 1971, even though a substantial part of the performance period had elapsed. Appellant's assertion that the scope of the work had been refined at the meeting of October 13, 1971, was disputed. The letter quoted the project officer as stating that at this meeting it became apparent that appellant was reducing the level of effort which had been accepted in its proposal. The letter denied that any request to increase the level of effort was made, and alleges that appellant was asked to continue at the proposal level of effort and not to curtail it. EPA denied receipt of the so-called "mid-term progress report" dated October 22, 1971. In addition, the letter states the report of November 12, 1971 contains no indication of an increase in appellant's effort and that the revised assignments are the same as those in appellant's proposal. We have previously quoted statements in the report of November 12, 1971, reflecting assertions by appellant of increased levels of effort. However, the work statement in the contract is general and absent the proposal, we are unable to determine whether these assertions are accurate.

In a letter, dated May 8, 1972 (Item 3b), appellant alleged that the actual cost overrun was \$9,381.99, asserting, *inter alia*, the following as justification therefor: "Notification to you on December

17, 1971, of an anticipated overrun and in the absence of a reply the professional obligation of RETA's team members to proceed with the completion of the project in order to meet EPA's schedule for a report to the United States Congress." The request for additional funding was denied by the contracting officer in a letter dated May 16, 1972 (Item 1c). Appellant reiterated its request for payment of the overrun in the amount of \$9,381.99 by letter, dated May 18, 1972 (Item 3a). The request was again denied in a letter from the contracting officer, dated May 31, 1972,⁶ and this appeal followed.

Appellant's letter to the Board dated, May 15, 1973, with attachments has been accepted as the complaint required by the Board's rules. Attachment one contains the following:

As a result of our concern and involvement in this project in order to meet the EPA deadlines, we did in fact incur additional costs estimated at \$9,817.00.

It was the decision of RETA's board of directors and top management to continue work in order to satisfy the client, and then work out a fair settlement with them.

RETA acted in good faith and knows that an equitable adjustment can be determined at this time.

Decision

The obvious purpose of the Limitation of Cost (LOC) clause is to enable the Government to control the funds allocated to contract

⁶ Item 1b. While not labeled a final decision of the Contracting Officer, no useful purpose would be served in failing to treat it as such.

work.⁷ While the record herein establishes that oral and written notice of the overrun was given, it is well settled that such notice does not without more obligate the Government to fund the overrun⁸ and that a contractor who proceeds with performance without being notified that additional funds have been provided assumes the risk of being deemed to have acted as a volunteer.⁹

An exception to the above rule may be stated as follows: where the Government with knowledge of the overrun directs or induces continued performance or where the contractor proceeds with performance in reliance on express or implied understandings that additional funds will be provided, the Government has been deemed, as a matter of law, to have waived its discretion to refuse to fund the resulting overrun.¹⁰ In addition, the LOC clause has consistently been held to be inapplicable to actual or constructive changes.¹¹

⁷ " * * * That paragraph [paragraph (b) of the LOC clause] specifically contemplates a right in the Government to make a free and unfettered decision with respect to the continued funding of a contractor who anticipates a cost overrun * * *." *J. J. Henry Company, Inc.*, ASBCA No. 15473 (August 16, 1972), 72-2 BCA par. 9641 at 45,020.

⁸ *J. J. Henry Company, Inc.* (note 7, *supra*) at 45,022.

⁹ *North American Rockwell Corporation*, ASBCA No. 1432 (November 29, 1971), 72-1 BCA par. 9207.

¹⁰ *J. J. Henry Company, Inc.* (note 7, *supra*) and cases therein cited.

¹¹ *Bolt, Beranek and Newman, Inc.*, ASBCA No. 14655 (May 25, 1971), 71-1 BCA par. 8899. The "changes" clause in the instant contract is substantially similar to that quoted in the cited case 71-1 BCA at 41,355. It should be noted, however, that under later versions of the LOC clause changes are not excluded from

Appellant has not alleged and the record would not support any claim that after giving notice of the overrun, it was induced or directed to continue performance or that it proceeded with performance in reliance on any understanding that additional funding would be provided. Indeed, in view of the letter, dated December 29, 1971, reminding appellant of the provisions of the LOC clause and cautioning appellant not to exceed the estimated cost of the contract, we find that appellant was not urged to continue performance after it gave notice of the overrun and that there was no understanding, express or implied, that additional funding would be provided.¹² This much appears to be conceded by the statement from the complaint, quoted above, that it was the decision of appellant's board of directors and top management to proceed with performance in order to satisfy the client and then work out a fair settlement. On this record, we can find no basis for a holding that the Government has waived its discretion to refuse funding of the overrun.

The letter of December 17, 1971, giving written notice of the overrun is susceptible to the construction

the limitations of the clause. *See, e.g., J. J. Henry Company, Inc.*, ASBCA Nos. 13835 *et al* (May 25, 1971), 71-1 BCA par. 8898 (footnote 1).

¹² Although we find as a fact that the level of effort required for satisfactory completion of the project was discussed at the meeting of October 13, 1971, the details of this meeting are not in the record and the Government has denied requesting an increased level of effort. It is, of course, clear that this meeting antedated by two months notice of the cost overrun.

that appellant is alleging the over-run arises from an increased level of effort. Appellant has also alleged that the scope of the work was refined at the meeting of October 13, 1971, and, as we have seen, there are statements in the report of November 12, 1971, to the effect that the level of effort was being expanded. However, it is well settled that statements in claim letters and pleadings do not constitute proof.¹³ The statement of work in the contract is general and appellant's proposal is not in the record. It follows that appellant has not sustained its burden of showing that a change was effected, which would entitle appellant to an equitable adjustment notwithstanding the cost ceiling in the contract.

CONCLUSION

The appeal is denied.

SPENCER T. NISSEN, *Member*.

I CONCUR:

WILLIAM F. MCGRAW, *Chairman*.

UNITED STATES FUEL COMPANY

2 IBMA 315

Decided November 20, 1973

Appeal by the Mining Enforcement and Safety Administration (MESA) from a decision of an Administrative Law Judge dismissing five consolidated section 109(a) penalty proceedings in Docket Nos. DENV 72-68-P, 72-72-P, 73-14-P, 73-15-P and 73-48-P.

¹³ *Service Construction Corporation, IBMA-678-10-67* (January 12, 1970), 70-1 BCA par. 8068.

Reversed and remanded.

Federal Coal Mine Health and Safety Act of 1969: Hearings: Procedure

Where, under 43 CFR 4.512, an operator withdraws its petition for hearing and formal adjudication after the close of an evidentiary hearing, but, prior to issuance of a final decision, it is not entitled to a dismissal without prejudice.

APPEARANCES: William H. Woodland, Esq., for appellant, Mining Enforcement and Safety Administration; Richard H. Nebeker, Esq., for appellee, United States Fuel Company.

OPINION BY MR. DOANE

INTERIOR BOARD OF MINE OPERATIONS APPEALS

This case involves a question of considerable importance in the administration of the Federal Coal Mine Health and Safety Act of 1969¹ in that its resolution will directly affect the disposition of a large number of cases pending before the Administrative Law Judges (Judges). The Board is asked to decide whether an operator may withdraw unilaterally from a proceeding after the close of the evidentiary hearing but prior to issuance of the Judge's decision and thereby vitiate the enforcement effort of the Secretary. For the reasons set forth hereinafter in detail, we answer this question in the negative, and accordingly, reverse the decision below, which ordered dismissal without

¹ P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

prejudice, and remand the case for further proceedings.

I.

Factual and Procedural Background

On November 29 through November 30, 1972, a full evidentiary hearing was held on the notices of violation in the above-listed dockets which had been consolidated by order of the Administrative Law Judge. During the course of the hearing, the operator agreed to pay some of the assessments and some of the notices were dismissed due to insufficiency of evidence. At the close of the hearing, disposition of the remaining notices, which are the only ones before us on appeal, required only issuance of a written decision by the Judge.

On March 9, 1973, the United States District Court for the District of Columbia issued its opinion in *National Independent Coal Operators Association v. Morton*, 357 F. Supp. 509 (D.D.C. 1973) (hereinafter, *NICOA*).² In that case, the court held invalid a proposed order of assessment which had become final by operation of law, there having been no timely protest and request for hearing by the operator. 30 CFR 100.4(e). The court concluded that the Act requires case-

by-case findings of fact and ruled that the form used by the Assessment Officer, wherein he merely filled in the operator's name, the alleged violations, and the assessments proposed, did not satisfy that requirement.

On April 20, 1973, United States Fuel Company filed motions to dismiss the pending proceedings premised upon the *NICOA* decision. Without objection from the parties, the Judge decided to treat the motions as motions to withdraw pleadings pursuant to 43 CFR 4.512.³ On April 24, 1973, the Department suspended the informal assessment procedures of 30 CFR part 100 pending the outcome of an appeal of the *NICOA* judgment. In addition, the Department promulgated on that same date amendments to 43 CFR which provided for a new informal assessment procedure and which required institution of formal adjudication in every case where the operator failed to pay the informal assessment voluntarily. 38 F.R. 10086-7.

By decision dated, June 11, 1973, the Administrative Law Judge granted withdrawal of the operator's petitions and dismissed the pending dockets without prejudice. A timely notice of appeal was filed by the Bureau of Mines (Bureau). On July 16, 1973, the Mining Enforcement and Safety Administration (MESA) was substituted for the Bureau as the appellant.⁴

² The Department has appealed this decision to the United States Court of Appeals for the District of Columbia where it is pending. No. 73-1678. This case has been followed in *Morton v. G.M.W. Coal Co., Inc.*, CCH Employment Safety and Health Guide par. 16,253 (W.D. Pa. 1973).

³ A conforming amendment to the motion was filed on April 30, 1973.

⁴ See 38 F.R. 18695 (1973).

II.

Issue Presented on Appeal

Whether the Administrative Law Judge erred in dismissing penalty proceedings without prejudice after the operator withdrew its petitions for hearing and formal adjudication after the close of the evidentiary hearing.

III.

Discussion

The Administrative Law Judge based his decision to grant withdrawal on the original version of 43 CFR 4.512, 36 F.R. 17338 (August 28, 1971), which provided:

A party may withdraw a pleading at any stage of a proceeding without prejudice.

It has since been amended substantially; however, we need not consider that amendment in the disposition of this appeal.⁵

In the case at hand, the Judge apparently concluded that 43 CFR 4.512 mandatorily required him to dismiss any docket where the operator withdraws its petition for hearing and formal adjudication at any

time prior to the issuance of a written decision. Appellee, United States Fuel, contends that the Judge's interpretation was correct and urges us to affirm his decision. However, we are obliged to reject that interpretation because it is based upon a misreading of the language of the regulation and its acceptance would result in extraordinary delay and an unjustifiable disruption of the enforcement of the Act and the substantive regulations.

The essential fallacy in the Appellee's argument is the mistaken assumption that the term "withdrawal of a pleading" means withdrawal from the Secretary's jurisdiction as delegated to the Administrative Law Judges and the Board of Mine Operations Appeals.⁶ Section 4.512 of Title 43 CFR does not say that a party may withdraw from a *proceeding* at any time; nor does it say that when a party withdraws a pleading, the Administrative Law Judge must dismiss the proceeding. The regulation only states that the withdrawal of a pleading, whether it be a petition, an answer, or a mere amendment, shall be "*without prejudice*." We are of the opinion that the words of the regulation mean that while the Judge must permit the withdrawal of a pleading, the *effect* of the withdrawal is a discretionary matter for

⁵ See 38 F.R. 14170 (1973). Both parties have argued whether or not the amendment may be retroactively applied to this case. We recognize that procedural changes may be retroactively applied to pending actions in order to achieve statutory objectives provided there is no prejudice to substantial rights. See *Sun Oil Co. v. Federal Power Comm'n.*, 256 F.2d 233 (5th Cir. 1958), cert. den., 358 U.S. 872 (1958). Nevertheless, we feel that such rulings should be avoided wherever possible. Since we can resolve this dispute on other grounds, we intimate no views as to whether this case comes within the ambit of the *Sun Oil* rule.

⁶ * * * Pleadings are formal allegations by a party of the facts constituting claims and/or defenses which are filed with the fact-finding tribunal competent to conduct a hearing and duly served on the opposing party or parties. * * * *Ranger Fuel Corporation*, 2 IBMA 186, 194, 80 I.D. 604, CCH Employment Safety and Health Guide par. 16,541 (1973).

case-by-case determination by the Administrative Law Judge in the first instance and ultimately by this Board in the exercise of its appellate jurisdiction.⁷

In this, as in other matters committed to the sound discretion of the Judges and of this Board, we must act with caution in order to avoid abuse of our delegated authority. We may fill in the interstices of a regulation, but we must avoid interpretations which are in reality amendments and amount to rule-making. Then too, we must be guided by the principle that the Secretary's regulations ought to be construed and applied flexibly so as to effectuate the remedial objectives of the Act and to secure just, prompt, and inexpensive final determinations. 43 CFR 4.500(c), 4.505(b). Cf. 30 U.S.C. § 815(c).

Prior to the *NICOA* decision, the interpretation and application of 43 CFR 4.512 conformed to these general principles. Ordinarily, the pleadings that the operators sought to withdraw in penalty cases were petitions for hearing and formal adjudication. Compare, *Ranger Fuel Corporation* (cited at footnote 6). The usual motivation for such withdrawals was an agreement to pay the proposed assessment or a determination by the operator to defend an enforcement suit in federal court. The Judges customarily granted dismissal because they knew that the proposed order of assessment issued

by the Secretary's Assessment Officer would become final by operation of law. They chose what they had every reason to believe was a just, expeditious, and the most inexpensive final Secretarial action consistent with the substantive statutory objectives. Since dismissal suited the interests of all concerned, the Judges' orders were summary and the precise nature of section 4.512 was never really elaborated. This uniform application of the regulation seems to have misled some into the mistaken belief that the existing practice was a rigid, almost immutable procedural fact of life under the Act.

In the aftermath of the *NICOA* decision and the suspension of 30 CFR Part 100, it became obvious that a dismissal predicated upon the withdrawal of a petition for hearing and formal adjudication was bound to have a different and disruptive effect. Dismissal could no longer result in the finalization of a proposed order of assessment. Rather, a dismissal would relegate the case to a limbo status and require the Department to apply its adjudicatory machinery over again from the beginning. The closer a proceeding was to the issuance of a written decision, the more wasteful, burdensome, and absurd such a conclusion was likely to be. 43 CFR 4.512 does not, and was never intended to, permit that kind of result, and we will not interpret its provisions to do so.

The case at hand is a good illustration of the disruption which

⁷ See decision of Administrative Law Judge George A. Koutras in *Snap Creek Coal Company*, Docket No. HOPE 72-301-P (May 24, 1973).

November 20, 1973

would flow ineluctably from acceptance of Appellee's position. Here, almost an entire proceeding to assess civil penalties, from the filing of pleadings straight through to the conclusion of an evidentiary hearing, has taken place. All that remains to be done is the issuance of the decision by the Judge.

After *NICOA*, the Bureau (now MESA) for the first time resisted motions seeking dismissal, predicated upon withdrawals of petitions, which were designed to take advantage of what appeared to be a lacuna in the law. Forced to construe 43 CFR 4.512 in a definitive fashion, some Judges fully recognized the problem and refused to dismiss, reasoning in substance that continuance of the prior practice in penalty cases would be an abuse of discretion in view of the delay and expense that was bound to occur.⁸ In our judgment, they correctly rejected the theory that 43 CFR 4.512 was either completely mandatory or fully self-executing. We are of the opinion that these Judges acted in accordance with a close reading of the literal words of 43 CFR 4.512 and with due regard for the standards of adjudication discussed above.

It follows from what has been said that the Judge in the case at hand correctly granted the withdrawal of the operator's petitions. However, he abused his discretion when he then dismissed the dockets.⁹

We reject Appellee's argument that it was somehow coerced into formal adjudication or prejudiced by the proposed assessment orders. United States Fuel was not obliged to go to hearing to escape allegedly arbitrary informal assessments. The operator could have sought immediate relief in the appropriate federal district court. See *NICOA*, *supra*. Appellee may have labored under an erroneous impression to the contrary, but subjective feelings of coercion without any basis in reality have no legal significance.¹⁰ In addition, it is important to emphasize that the hearing for which Appellee petitioned was *de novo*, and that in moving for withdrawal, United States Fuel sought to abort a proceeding on the verge of providing findings of fact possessing the legal sufficiency allegedly missing in the findings contained in the instant proposed orders of assessment. See *Western Slope Carbon, Inc.*, 2 IBMA 161, 80 I.D. 707, CCH Employment Safety and Health Guide par. 16,300 (1973).

While we must decline to adopt an interpretation of a regulation which would produce extensive and unjustified delays in the processing of many penalty cases, we nevertheless recognize that important substantive changes in the informal assessment process have taken place and we do not wish to deprive the Appellee or anyone similarly situated of substantial rights. Un-

⁸ *Ibid.*

⁹ The minimal effect of the withdrawal of a pleading is that any factual statement contained therein cannot be used as admissions:

¹⁰ The operator should have known that it need not go to hearing since it was joined as a party plaintiff in the *NICOA* case.

doubtedly, the new assessment formula is yielding quantitatively different results. An operator, having the benefit of this new formula, to which other litigants have been entitled, might very well decide to settle and forego further litigation. *See Ranger Fuel Corporation* (cited at footnote 6).¹¹ Therefore, in the interests of justice and sound administrative policy, we conclude that an operator, at any time until the issuance of a final decision, may by proper motion seek a continuance so that it can obtain an informal assessment from MESA under the new formula and then take appropriate followup action by way of settling or pressing on with the proceedings. Failure to seek a new informal assessment should be deemed a waiver of the substantive right.

If an operator similarly situated to United States Fuel persists in the withdrawal of its pleadings for the sole purpose of obtaining a dismissal, the Judge should hold it in default and should issue a decision accordingly. *See generally* 43 CFR 4.544. Since a full evidentiary hearing has been held in the instant case, there is no need to require any further proceedings such as issuance of a show cause order.

We believe that our decision here accords any operator in the position of United States Fuel every due process right to which it is entitled.

At the same time, we have tried to assure, consistent with the limitation of our jurisdiction to adjudicative matters, that the Secretary's regulations will continue to facilitate achievement of the objectives of the Act.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision appealed from IS REVERSED and REMANDED for further proceedings consistent with this opinion.

DAVID DOANE, *Member*.

I CONCUR:

C. E. ROGERS, JR., *Chairman*.

BUFFALO MINING COMPANY

2 IBMA 327

Decided November 21, 1973

Mining Enforcement and Safety Administration (MESA) appealing an initial decision issued on April 11, 1973, limited to the extent that it failed to find a violation of section 304(d) alleged in a section 109(a) proceeding under the Federal Coal Mine Health and Safety Act of 1969 (Docket No. HOPE 72-151-P).

Decision modified.

Federal Coal Mine Health and Safety Act of 1969: Penalties: Evidence

A violation of section 304(d) will be upheld where an acceptable sampling of

¹¹ It is noteworthy that the procedural posture of the instant case is significantly different from *Ranger Fuel*. *Ranger* came to the Board on a certified question and our ability to deal with the complex of issues concerning withdrawals of various documents containing pleadings was quite circumscribed. 43 CFR 4.602(d).

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a floor area required to be rock dusted reveals the presence of less than 65 per centum of incombustibles.

Federal Coal Mine Health and Safety Act of 1969: Hearings: Procedure

An Administrative Law Judge may not vacate an order of withdrawal in a civil penalty proceeding held pursuant to section 109(a).

APPEARANCES: Robert A. Long, Esq., Associate Solicitor, J. Philip Smith, Esq., Assistant Solicitor, and Mark M. Pierce, Esq., Trial Attorney, in behalf of appellant, MESA.

OPINION BY MR. ROGERS

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Procedural and Factual Background

On June 23, 1971, MESA Inspector Paul M. Chikos conducted an inspection of Buffalo Mining Company, pursuant to the Federal Coal Mine Health and Safety Act of 1969 (hereinafter the Act).¹

The inspector issued Order of Withdrawal No. 1 PMC after discovering what appeared to be inadequate rock-dust applications in an area that required such treatment. Thereafter, he took a sampling of the floor. Subsequently, laboratory analysis determined that the incombustible content of the sampling was 22 percent.

MESA filed a petition for assessment of civil penalties pursuant to section 100.4(i) of Title 30, Code

of Federal Regulations, for the violations alleged in the order of withdrawal and for other violations not in issue on this appeal. A hearing was held on August 14, 1972, and on April 11, 1973, the Administrative Law Judge (Judge) issued an initial decision which, *inter alia*, vacated the order of withdrawal in question. Counsel for MESA filed a notice of appeal with the Board on May 17, 1973. MESA's brief was timely filed.²

Issues Presented on Appeal

1. Whether an adequate sampling of the floor of a mine is alone sufficient to establish a prima facie violation of section 304(d) of the Act.

2. Whether an Administrative Law Judge may vacate an order of withdrawal in a civil penalty proceeding held pursuant to section 109(a) of the Act.

Discussion

The basis of this appeal arises from a determination by the Administrative Law Judge (Judge) that the failure of an inspector to strictly comply with instructions issued by MESA³ in regard to the method of collecting dust samples

² Buffalo Mining Company, appellee in this case, has not participated in the appeal.

³ United States Department of the Interior, Bureau of Mines, Coal Mine Safety Inspection Manual for Underground Coal Mines, August 1969, page 16 as amended by memorandum dated May 10, 1971, from the Acting Assistant Director, Coal Mine Health and Safety, Bureau of Mines (MESA). In view of our disposition of this appeal, a recital of these provisions is not necessary.

¹ P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

to support a violation of section 304 (d), resulted in the failure to collect an "acceptable sample." Accordingly, the Judge determined that MESA had not met the burden of proof in establishing the alleged violation. He, therefore, ordered the vacation of the Order of Withdrawal here under consideration.

MESA concedes that the inspector did not take a sampling of the roofs and the ribs of the mine, however, they contend that a sample taken from the floor is adequate to comply with the guidelines established by the Coal Mine Inspector's Manual, *as amended*, in collecting rock dust samples to support a violation of section 304(d).⁴

This Board has in the past taken official notice of instructions issued by MESA to its inspectors. *Hall Coal Company, Inc.*, 1 IBMA 175, 177, 79 I.D. 668, 671 (1972), CCH Employment Safety and Health Guide par. 15380 (1973). As a general rule, we are in agreement that they should be complied with by inspectors when they conduct an inspection of a mine. However, we are not prepared to come to a conclusion that a violation of those instructions

will preclude a finding of a violation of the Act, when the condition reported by the inspector constitutes a violation. Accordingly, under the facts of this case, the question as to whether the sample was obtained in violation of the applicable MESA instructions is of little moment, because our ultimate concern is whether the evidence of record will support the alleged violation.

We turn now to the Order of Withdrawal issued by the inspector at 9:40 a.m. on June 23, 1971. The condition or practice was set out as:

The rock-dust applications were inadequate for a distance of 116 feet inby engineer's spad No. 293 in No. 6 entry No. 1 Section.

The area from which persons were withdrawn was described as: "all areas inby the entrance to No. 1 section." This order was issued under section 104(a) of the Act.

In regard to the sampling of the floor, the inspector testified in effect that he started about 48 feet inby spad 293 in No. 6 entry. With a shovel he took a 6-inch band of material 1 inch deep from the floor for the distance of 20 feet, the width of the entry. He shook that through a 20-mesh screen onto a rubber mat, from which he took an amount sufficient to half fill the plastic bag furnished by the Bureau for that purpose (Tr. 880, 881). Accordingly, we find that the record clearly establishes that the inspector did take an adequate sampling of the floor, which was submitted to the laboratory for analysis. Subsequently, it was determined that the incombustibles

⁴ Section 304 (d) reads as follows:

"Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall be not less than 65 per centum, but the incombustible content in the return aircourses shall be no less than 80 per centum. Where methane is present in any ventilating current, the per centum of incombustible content of such combined dusts shall be increased 1.0 and 0.4 per centum for each 0.1 per centum of methane where 65 and 80 per centum, respectively, of incombustibles are required."

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tible content of the sampling was 22 percent. This condition established a prima facie showing of a violation of section 304(d), with respect to the floor. Consistent therewith, the Board is of the opinion that the Judge erred when he determined that the failure of the inspector to strictly comply with instructions issued by MESA resulted in the failure to collect an "acceptable sample" to support an alleged violation of section 304(d).

The inspector found an imminent danger when he issued the Withdrawal Order because the condition could propagate an explosion and create a fire. The Judge determined that an imminent danger was not present, that MESA failed to meet its burden of proof to establish imminent danger, and, thereafter, he ordered that Order of Withdrawal, No. 1 PMC, June 23, 1971, be vacated.

This Board has held "except insofar as an order of withdrawal may reflect upon the gravity of conditions and practices, the validity or invalidity of such order will not affect the subsequent assessment of penalties. * * * The validity of an inspector's judgment in issuing an order may be challenged in a review proceeding brought under section 105 of the Act. However, where a section 104(a) order is vacated, the conditions or practices described in such order may, nevertheless, constitute violations of mandatory safety standards, subject to penalty assessments. *Eastern Associated Coal Corporation*, 1 IBMA 233, 236,

79 I.D. 723, 726 (1972), CCH Employment Safety and Health Guide par. 15,388 (1973). The two basic issues involved in the assessment of a civil penalty are: (1) whether a violation of the Act occurred, and (2) what amount should be assessed as a penalty if a violation is found to have occurred. Accordingly, we are of the opinion that the Judge had no authority to make a finding as to the validity of the Order of Withdrawal. In a similar vein this Board has held that the validity of such an order is not an issue in a section 109 proceeding and it is error for the Judge to either sustain or vacate such order. *Zeigler Coal Company*, 2 IBMA 216, 224, 80 I.D. 626, 630, CCH Employment Safety and Health Guide par. 15,485 (1973).

The Judge concluded in pertinent part that rock dust was required in the area in question and we have concluded that an adequate sampling of the floor was taken which establishes a prima facie showing of a violation of section 304(d).

The Board concludes from the foregoing that MESA proved by a preponderance of the evidence that a violation of section 304(d) had occurred.

Section 109(a) (1) of the Act requires that in determining the amount of the appropriate civil penalty, the Secretary of the Interior shall consider six criteria. In so doing, as delegate of the Secretary, we make the following findings of fact: (1) The prior violations at the

mine consist of seven notices dated December 10, 1970, six notices dated December 11, 1970, and one notice dated January 12, 1971, all of which were decided on March 28, 1973 (decision below Dec. 10). (2) A penalty of \$100 is appropriate with regard to the size of the business of the operator (Dec. 12). (3) Negligence on the part of the operator was not established. (4) The imposition of a \$100 penalty will have no negative effect on the operator's ability to continue in business (Dec. 12). (5) The violation is not considered grave. The equipment that was operating 125 feet inby was no imminent threat. No power source ran through the area in question. Methane gas was not present (Dec. 9). (6) The operator complied with the Order of Withdrawal by abating the condition rapidly and in good faith (Ex. P-14).

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision issued April 11, 1973, IS MODIFIED to the extent that Notice of Violation No. 1 PMC IS REINSTATED, and that Buffalo Mining Company IS ASSESSED an additional \$100 for a total of \$950 to be paid within 30 days from the date of this decision.

C. E. ROGERS, JR., *Chairman.*

I CONCUR:

DAVID DOANE, *Member.*

COAL PROCESSING CORPORATION

2 IBMA 336

Decided *November 26, 1973*

Appeal by the Coal Processing Corporation from a decision dated July 30, 1973, by Administrative Law Judge George H. Painter, assessing a civil monetary penalty of \$5,000 for two violations of the Federal Coal Mine Health and Safety Act of 1969. (Docket No. NORT 72-122-P.)

Affirmed as modified.

Federal Coal Mine Health and Safety Act of 1969: Notices of Violation: Abatement

A change in the ventilation system to eliminate accumulations of methane in a mine will not constitute a violation of section 303(k) of the Act where it is established that such remedial procedure was the proper corrective action.

Federal Coal Mine Health and Safety Act of 1969: Evidence: Sufficiency

A visual observation will support a violation of section 304(a)—accumulation of coal dust.

APPEARANCES: Thomas H. Barnard, Esq., Cleveland, Ohio, Attorney for appellant, Coal Processing Corporation; Robert W. Long, Esq., Associate Solicitor, J. Philip Smith, Esq., Assistant Solicitor, and Edward J. Rodzinak, Trial Attorney in behalf of appellee, Mining Enforcement and Safety Administration (MESA), formerly U.S. Bureau of Mines.

mine consist of seven notices dated December 10, 1970, six notices dated December 11, 1970, and one notice dated January 12, 1971, all of which were decided on March 28, 1973 (decision below Dec. 10). (2) A penalty of \$100 is appropriate with regard to the size of the business of the operator (Dec. 12). (3) Negligence on the part of the operator was not established. (4) The imposition of a \$100 penalty will have no negative effect on the operator's ability to continue in business (Dec. 12). (5) The violation is not considered grave. The equipment that was operating 125 feet inby was no imminent threat. No power source ran through the area in question. Methane gas was not present (Dec. 9). (6) The operator complied with the Order of Withdrawal by abating the condition rapidly and in good faith (Ex. P-14).

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), **IT IS HEREBY ORDERED** that the decision issued April 11, 1973, **IS MODIFIED** to the extent that Notice of Violation No. 1 PMC **IS REINSTATED**, and that Buffalo Mining Company **IS ASSESSED** an additional \$100 for a total of \$950 to be paid within 30 days from the date of this decision.

C. E. ROGERS, JR., *Chairman.*

I CONCUR:

DAVID DOANE, *Member.*

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November 26, 1973

OPINION BY MR. ROGERS
INTERIOR BOARD OF MINE
OPERATIONS APPEALS

Procedural Background

On February 9, 1971, Bureau of Mines Inspector Monroe L. West conducted an inspection of Coal Processing Corporation (Dixiana Mine) pursuant to the Federal Coal Mine Health and Safety Act of 1969 (hereinafter the Act).¹ The inspector issued Order of Withdrawal No. 1 MLW. This Order contained the following:

Air (containing over 1.5 per centum of methane) which had passed over caved pillared areas was used to ventilate the active working places in A-2 section off 1 left off 1 main north entries. Nos. 4 and 5 rooms were cut through into cave pillared areas without any test holes being drilled in advance of the faces.²

On February 10, 1971, Inspector West issued Order of Withdrawal No. 1 MLW. This Order contained the following:

Accumulations of loose coal and coal dust present from the loading point to the working faces in the 8 entries of the A-1 working section, rock dust applica-

tions in this area were obviously inadequate.³

MESA filed a petition for assessment of civil penalties pursuant to section 100.4(i) of Title 30, Code of Federal Regulations, on November 17, 1971, for the violations alleged in the withdrawal orders. A hearing on the merits was held on May 23, 1973, and on July 30, 1973, the Administrative Law Judge issued an initial decision, assessing a civil monetary penalty of \$5,000 for two violations of the Act.

Factual Background

Mr. Simpson Mann, section foreman for the operator, testified that at 4:35 p.m., the start of the evening shift, he checked all the faces for gas and ventilation and found everything normal. Mining then commenced, starting in room 6. Upon mining through, the miners cleaned the area so that it could be timbered and then proceeded to room 5 and continued mining until they holed through into a cave pillared area. Shortly thereafter, the section foreman checked the ventilation in the area and found that no moving air was coming into the active working face of room 5. The crew then moved into room 4 where they holed through on the right side, backed out, and made a set for the left side. Approximately 15 to 20 minutes later, before work was

¹ P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

² The Board notes that in addition to the alleged violation of section 303(k) of the Act, the Order of Withdrawal No. 1 MLW, dated February 9, 1971, referred to a practice that could have been alleged as a violation of section 317(b) of the Act (cutting into cave pillared areas without test holes being bored in advance of the face). This practice was not contained in MESA's Petition for Assessment of Civil Penalty; however, in an early stage of the hearing a motion was made to amend the letter of notification so as to include a violation of section 317(b) of the Act. Upon timely objection, the Judge denied the motion.

³ An alleged violation of section 304(d) was in MESA's Petition for Assessment of Civil Penalty; however, a sampling had not been taken. The Judge dismissed the alleged violation of section 304(d).

started on the left side of the face, Mr. Mann testified that he conducted an air velocity check with an anemometer and a methane test with a flame safety lamp at the face and detected no air movement or methane. Shortly thereafter, an ignition occurred.⁴

Thereafter, when the safety of the miners had been assured, Mr. Mann returned to the area of room 4 and checked for methane, and for the first time detected methane in an area approximately 30 feet from the face in room 4. Following instructions from Mr. Haynie, the general mine foreman, Mr. Mann had the line curtain shifted from the left side of No. 4 entry to the right side and extended further into the face. The purpose of this was to clear the area of methane. This change in the ventilation system could also have resulted in increasing the pressure on the right side, thereby increasing the possibility that intake air would be forced to flow through rooms Nos. 5 and 6, through the pillared area, and into the return by way of room No. 4.

Mr. Monroe L. West, Bureau Inspector, entered the mine on February 9, 1971, to investigate the ignition of a methane-air mixture that had occurred the previous evening. At the time of the inspection, there was no mining activity or movement of equipment taking place. During the course of his investigation, Mr. West determined that approximately 4,500 cfm (cubic feet per

minute) of air (containing over 1.5 per centum of methane) was entering No. 4 room of the A-2 working section from the area from which pillars had been wholly or partially extracted. On this basis, Mr. West issued the Withdrawal Order. He noted that rooms Nos. 4 and 5 had been cut through to the pillared area and that air from the pillared area had been used to ventilate the active working places in the A-2 section. Nos. 4 and 5 rooms were cut through into cave pillared areas without any test holes being drilled in advance of the faces. (See footnote 2, *supra*.)

Inspector West and Mr. Kilgore, the safety director of the mine, concurred that the remedial ventilation procedure followed by the operator after the ignition was the proper corrective action.

Order of Withdrawal No. 1 MLW, February 10, 1971, was issued by Inspector West because the operator had permitted large quantities of loose coal and coal dust to accumulate in violation of section 304(a) of the Act. He testified that at the loading point of No. 3 entry, coal dust had built up to the extent that it was being used as a ramp for shuttle cars delivering coal. Entries No. 3, 4 and 5 had accumulations ranging between two and four inches on the roadway and up to eight inches at the base of the ribs. The inspector testified that as a result of a visual inspection, he concluded that over 50 percent of the coal accumulations at the base of the ribs consisted of machine cut-

⁴ From the transcript we find that this was an explosion (Tr. 46).

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tings. Above these cuttings sloughage had accumulated. According to Inspector West, sloughage can be distinguished from machine cuttings. This general condition existed for a distance of approximately 900 feet (Tr. 88, 89, 93, 94).

For the operator, Mr. Kilgore testified as to the cleanup procedures used and that normally the loading points would be cleaned three or four times a day. In his opinion the two- to eight-inch spillage reported by the inspector was "very little." He further testified that a substantial part of the accumulation observed by Mr. West consisted of rib rashing. The section involved has been generally bothered with sloughing (Tr. 114-118).

II

Issues Presented on Appeal

A. Whether the evidence is sufficient to support a violation of section 303(k) of the Act.

B. Whether the evidence is sufficient to support a violation of section 304(a) of the Act.

A.

In a 109(a) (1) civil penalty proceeding, the propriety of the issuance of the Withdrawal Order is not in issue. Under section 105(a) (1) appellant had 30 days to apply for a review of the order but did not take advantage of the opportunity.

The evidence in this record clearly establishes that within 15 to 20 minutes after room 4 was holed

through, Mr. Mann conducted an air velocity check with an anemometer and a methane test with a flame safety lamp at the face and detected no air movement or methane. Subsequent thereto, the ignition occurred. (This ignition is of no concern to us on this appeal because a penalty was paid for that violation. Also, the Judge during the proceedings stated: "We will not go into the merits of the ignition * * *." (Tr. 9.))

We find that after withdrawing the miners, Mr. Mann returned to the area of room 4 and for the first time detected the presence of methane, approximately 30 feet from the face. Subsequently, after a discussion with the general mine foreman, the decision was made to take corrective action to eliminate the methane by changing the ventilation system. (Tr. 46-49.) In addition to removing the methane, the change also forced air into rooms Nos. 6 and 5, through the pillared area, and into the return by way of room No. 4. (Tr. 64.)

Based upon the foregoing, the Board concludes that if a violation of section 303(k) of the Act was established, it must be bottomed on the conditions that arose after the change was made in the ventilating system, *i.e.*, at the time of the inspection.

The testimony of Inspector West and that of Mr. Kilgore, the safety director, established that the remedial procedure followed by the operator after the ignition was the proper corrective action taken

under the circumstances that were present. (Tr. 38, 65.)

Inspector West also testified as follows:

They immediately ceased mining operations in the area. They withdrew the men, equipment and material back to a safe area where they could again start mining. The area at the point of intersection, ventilation was well established to that point where they would dilute and render harmless and carry away any possible future accumulations of methane that may be admitted in the area. (Tr. 23.)

Without indulging in a semantic disputation as to the meaning of "to ventilate" as used in section 303(k), we hold that under the facts and circumstances present in this case, the air involved was being utilized to abate a dangerous condition. Accordingly, we hold, under the facts before us in this case that a violation of section 303(k) was not established.

We note that section 303(u) in part, reads as follows:

Changes in ventilation which materially affect the main air current or any split thereof and which may affect the safety of persons in the coal mine shall be made only when the mine is idle. * * *

We believe that this section is applicable to the facts that are present in the instant case and is dispositive.

B.

We have examined the pleadings submitted by both parties and the transcript and are convinced that the violation of section 304(a) was established by MESA. Accordingly, we adopt, with one exception, the

following portions of the Judge's decision below.

Order of Withdrawal No. 1 MLW, February 10, 1971

It is Respondent's contention that much of the loose coal and coal dust that had accumulated along the ribs was caused by sloughing. The ribs will continue sloughing until an equilibrium is attained; efforts to remove the sloughage will, therefore, inevitably provoke a renewal of the process until an equilibrium is reestablished. Inspector West testified that the Bureau recognizes the sloughing tendency in some mines and permits the existence of adequately saturated and inerted accumulations in order to allow the sloughing to stabilize. However, more than 50 percent of the accumulation was clearly distinguishable as continuous mining machine cuttings and not sloughage. On that basis it seems evident that even the Bureau's policy on sloughing would not condone the conditions as described in the testimony.

Under section 304(a) a violation may be based upon visual observation without need of measurements or samples. The weight of the evidence clearly indicates that a violation of section 304(a) of the Act did in fact exist. Just the large accumulations of loose coal and machine cuttings at the loading points and in the passages for 900 feet were sufficient to create a serious condition without the disputed accumulation along the ribs. The fact that they were ground to a fine dry dust made them a stimulant to any ignition source, a fuel for flame propagation, and a catalyst for an explosion.

Considering the extensive area of the violation and the fact that there did exist an ongoing cleanup program it is difficult to explain how such an accumulation was tolerated. * * * It is unreasonable to attribute such an accumulation to the three and one half hour timespan between the beginning of the shift * * *. It is, therefore, concluded that Respondent

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was negligent in permitting the development of this hazardous condition. Although Inspector West testified that a good faith effort was made to rapidly abate the condition no explanation was offered why five days were required before the order was terminated.

We are somewhat concerned about the last above-quoted sentence in the Judge's decision, because from our independent review of the record, we find that a good faith effort was made to rapidly abate the condition.

At the time of the inspection on February 10, 1971, all mining operations had ceased. On February 11, 1971, a cleanup operation was commenced utilizing two men who shoveled, a buggy driver, a loading operator and Mr. Mann (Tr. 125). During an eight-hour shift, the cleanup was not accomplished, partially because of an inexperienced loader operator and machinery breakdowns (Tr. 127). February 12, 1971, was a holiday (Lincoln's Birthday), February 13 and 14 was the weekend and the Withdrawal Order was terminated at 11 a.m., February 15, 1971. We find this to be an adequate explanation of the five-day delay before the order was terminated. Accordingly, we will set aside the assessed penalty and assess a penalty of \$1,200.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED:

(1) That the alleged violation of section 303(k) as set forth in Order of Withdrawal No. 1 MLW, February 9, 1971, IS VACATED and the penalty assessed therefor below in the amount of \$3,000 IS SET ASIDE;

(2) that the decision below assessing a penalty of \$2,000 with respect to the violation of section 304(d) of the Act IS MODIFIED by reducing said assessment to \$1,200; and

(3) that Coal Processing Corporation pay the amount of \$1,200 within 30 days from the date of this decision.

C. E. ROGERS, JR., *Chairman.*

I CONCUR:

DAVID DOANE, *Member.*

POWER CITY ELECTRIC, INC.

IBCA-950-1-72

Decided November 27, 1973

Contract No. 14-03-1010A, 230/115 KV Line, No. 2 Coos and Curry Counties, Oregon, Bonneville Power Administration.

Sustained.

Contracts: Construction and Operation: Construction against Drafter—
Contracts: Construction and Operation: Drawings and Specifications—
Contracts: Construction and Operation: Estimated Quantities

Where a contractor's interpretation of the amount of access road improvement for which payment would be made under

a contract for the construction of a power line was determined to be reasonable and, based upon a site investigation, the contractor had reason to suspect that the Government's estimate of the amount of access road was substantially understated, but the Government withheld the specific list of access roads which prior to the issuance of the invitation it had determined were necessary for its needs and for which payment would be made, the Board holds that the Government's failure to disclose material information in its possession prior to bid overcame the consequences normally attributable to a bidder who fails to make inquiry concerning an apparent conflict between the estimated quantity and the results of the site investigation.

APPEARANCES: Mr. Robert W. Winston, Jr., Attorney at Law, Winston, Cashatt, Repsold, McNichols, Connelly & Driscoll, Spokane, Washington, for appellant; Mr. David E. Lofgren, Jr., Department Counsel, Portland, Oregon, for the Government.

OPINION BY MR. NISSEN

INTERIOR BOARD OF CONTRACT APPEALS

Under a contract for the construction of a power line, appellant seeks compensation at the contract unit price for the improvement of additional access roads beyond those designated for improvement by the Government.

Findings of Fact

The contract,¹ awarded on September 2, 1970, is in the estimated amount of \$1,219,815 and calls for the construction of the Bandon—Gold Beach 230/115 KV Line No. 2 in Coos and Curry Counties, Oregon. The line is approximately 52 miles long. For most of its length, the line parallels the existing Bandon—Port Orford and Port Orford—Gold Beach 115 KV Lines. Prospective bidders were advised that clearing of right-of-way and construction of designated access roads was being performed under a separate contract under which completion might be extended until approximately April 1, 1971, and that certain tracts of the right-of-way would not be available until specified dates. The contract included Standard Form 23-A (June 1964 Edition) with revisions not pertinent here.

Resolution of the controversy involves the interpretation of contract provisions. The various items of work in the invitation were divided into two groups: Group A, Access Roads and Group B, Line Construction. The former group is described in part as follows:

<i>Group A, Access Roads</i>	<i>Approximate quantity</i>	<i>Bid unit</i>	<i>Unit price</i>	<i>Amount</i>
1. Improve existing access roads.....	400	sta.....	\$.....	\$.....
2. 12-inch culvert, furnish and place....	100	lin ft.....	-----	-----
3. 18-inch culvert, furnish and place....	100	lin. ft.....	-----	-----
4. 24-inch culvert, furnish and place....	100	lin. ft.....	-----	-----
5. 36-inch culvert, furnish and place....	40	lin. ft.....	-----	-----
6. 48-inch culvert, furnish and place....	40	lin. ft.....	-----	-----
7. 3-inch minus gravel, furnish and place	2,000	cu. yd.....	-----	-----

¹ Appeal file, Item No. 1.

The specifications provide in pertinent part:

"1-102. *Work to Be Done By the Contractor. A. Access Roads and Appurtenant Items.* 1. Improve approximately 40,000 feet of existing access roads.

"2. Furnish and place gravel, crushed aggregate, culverts, wire gates and fences. Place pipe frame and metal panel gates."

Pertinent to this controversy is the following section of the Supplementary General Provisions:

"2.115. *Quantities and Unit Prices.* A. The total estimated quantities necessary to complete the work as specified are listed in the 'Schedule of Designations and Bid Prices', attached to and made a part of these specifications.

"B. These quantities are estimates only and will be used as a basis for canvassing and evaluation [sic] bids and for estimating the consideration of the contract. The Contractor will be required to furnish and place the entire quantities necessary to complete the work specified, be they more or less than the estimated quantities.

"C. If the actual quantity of any bid item varies from the estimated quantity by more than 25 percent, the Contracting Officer and the Contractor, at the request of either, will negotiate for a revised unit price to be applied to the units of work actually performed in excess of 125 percent or less than 75 percent of the estimated quantity; provided, that no such negotiation shall be undertaken unless the variation

from the original contract amount for any bid item exceed [sic] \$4,000, based on the contract unit price."

Part III—*General Technical Provisions*—provides in part:

3-103. *Accessibility of Site.* A. Access to the right-of-way for transmission line construction and clearing will be from (1) intersecting or adjacent public roads and (2) any access roads and access road rights-of-way for which rights have been acquired by the Government. Roads existing on the right-of-way will be available to the contractor.

B. The contractor may at his expense construct additional roads and other means of access within the boundaries of the line right-of-way and on undeveloped access road rights-of-way acquired by the Government upon approval of location and type by the contracting officer. Roads shall be constructed in a manner which will not undermine any proposed or existing tower footings. In addition to performing current maintenance, the contractor shall take measures satisfactory to the contracting officer to prevent the occurrence of excessive erosion after use of these roads. Such measures as dips or culverts may be required by the contracting officer. All debris resulting from such work shall be removed and disposed of by the contractor.

C. The contractor shall maintain all roads used by him and upon completion of the job shall leave them in as good a condition as when first used by him. A road grading machine—not a bulldozer—shall be

used for maintenance and final grading. In no event shall the contractor interfere with the property owner's use of roads existing prior to the contractor's entry.

D. The contractor shall be solely responsible for securing the use of privately owned roads other than described in Paragraph A, above. The contractor shall also be solely responsible for use and occupancy of any private lands crossed by him in securing such additional access from public roads and Government-acquired access roads as he finds necessary for his operations.

3-104. *Availability of Right-Of-Way.* A. The term "right-of-way" includes substation, microwave station, radio station and building sites and access road and transmission line right-of-way which are provided by the Government. The term "other rights" includes those additional land rights which the Government considers necessary for performance of work under the contract.

B. The Government will make every reasonable effort to secure and make available right-of-way and other rights in advance of operations in sections of such size that the date of completion may be met.

C. The Government makes no representation that the right-of-way and other rights which it provides will include all rights which the contractor may find desirable. Any rights desired by the contractor in addition to those furnished by the

Government shall be acquired by the contractor.

* * * * *

The specifications include the following:

"4-404. *Special Water Supply and Erosion Areas.* The following rules shall be observed when referred to:

* * * * *

"Construction Rules

"Rule F-3. All contract and convenience access roads shall be provided with water bars every 50 feet, regardless of whether the road is pre-existent or newly constructed.

* * * * *

Part V

Access Road Construction and Improvement

Chapter 1

Contract Access Roads

5-101. *SPECIFIC INFORMATION. A. Standard Specification.*

The contractor shall improve contract access roads as listed on the Schedule of Designations and Bid Prices, as shown on the drawings, and in accordance with the following Standard Specification, dated March 6, 1970 with the exceptions stated below:

1. References to access road construction, intercepting dips, fords, and riprap are not applicable.

* * * * *

B. *Water Bar Requirements.* Approximately 20 water bars shall be constructed on contract and permanent non-contract access roads.

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*Standard Specifications For
Contract Access Roads*

March 6, 1970

5-102. *GENERAL. A.* Access roads required to be constructed or improved by the specifications or by supplemental orders from the contracting officer are designated as contract roads.

B. The contractor shall construct or improve access roads in locations specified by the drawings, by the specifications, and by the contracting officer.

C. The widths of the new roadbeds shall be no less than those specified in the drawings. The maximum grades shall be no greater than those shown on the drawings. Curves shall be widened to permit the hauling of either tower steel in 40-foot lengths or wood poles in 90-foot lengths, depending upon the design of the transmission line.

D. The minimum radius of curvature shall be 60 feet unless otherwise specified.

E. The number and location of turnouts and drainage structures will be determined in the field by the contracting officer.

F. Roads shall be constructed in manner which will not undermine any proposed or existing buildings, structures or transmission facilities.

G. Upon completion of the contract, all roads constructed or improved by the contractor shall be left in the condition they were at the time of their acceptance for partial payment.

5-104. *IMPROVEMENT OF EXISTING ACCESS ROADS. A. General.* The manner of performing work and the operations required for improving existing roads and turnouts shall in general be as specified in the provisions for the construction of new roads except as provided below.

B. *Clearing and Grubbing.* Clearing, grubbing, and disposal of waste material shall be in accordance with Section 5-103, Paragraphs A and B, except that the widths shall be no less than the widths of the roadbed plus ditches as specified in Paragraph C. below.

C. *Roadway.* The roadway shall be improved to conform generally to the line and grade of the road as originally constructed and to its original cross section or to the cross section shown on the drawing for new access roads, whichever is greater. All existing ditches shall be cleaned and new ditches shall be constructed where required.

D. *Turnouts.* If widening of the roadbed at a turnout is required by the preceding paragraph, the width of the turnout may be reduced by the width added to the roadbed.

* * * * *

5-106. *WATER BARS.* Water bars shall be constructed as shown on the drawing after the roadbed has been completed. Roadside ditches shall be modified to drain into the water bars. Surfaces shall be carefully shaped and compacted.

5-111. *PAYMENT. A. General.* Payment will be authorized only for

that access road work required by the specifications, drawing, and the contracting officer. Payment for construction or improvement of a station of access road will be made at the unit contract price only after all designations of work in that station have been completed and accepted.

* * * * *

C. Improvement of Access Roads and Turnouts. Payment will be made at the unit contract price and shall be full compensation for all costs involved in clearing and grubbing; all excavation; preparing and completing roadbed and shoulders; constructing water bars, ditches, and approaches; and finishing the roadway and slopes. The stations of improvement of existing access roads to be paid for shall be the number of stations of roadway ordered to be improved, measured along the center line thereof, finished according to these specifications and accepted. A station of improved access road shall consist of 100 linear feet. No measurement and no separate payment will be made for improvement of turnouts.

* * * * *

Chapter 2

Standard Specification for Non-Contract Access Roads

February 6, 1969

5-201. *GENERAL.* A. The contractor may construct and improve access roads on the line right-of-way for his convenience. The classes of roads which may be constructed

and improved are designated as permanent and temporary access roads. The contractor shall flag the locations and obtain the approval of the contracting officer as to location and class prior to constructing and improving. All costs of constructing and improving these roads shall be borne by the contractor except as specified below.

B. Material which may obstruct or impair the flow shall not be placed nor allowed to fall into any natural water course, even if intermittent.

5-202. *PERMANENT ACCESS ROADS.* A. Roads that provide access to tower or structure sites are designated as permanent access roads. This class of road shall be constructed and improved to the same standard as specified for contract access roads.

B. Culverts, gravel, crushed aggregate, and riprap, if required by the contracting officer, shall be furnished and placed in accordance with the preceding chapter.

5-203. *TEMPORARY ACCESS ROADS.* A. Roads that provide access to such places as landings and yarding areas and which are not to be incorporated in the Government's permanent access road system are designated as temporary access roads. This class of road shall be constructed so that erosion will be kept to a minimum, that any proposed or existing buildings, structures, or transmission facilities will not be undermined or unduly strained, and that domestic water supplies will not be contaminated. Adequate drainage and other meas-

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ures, as directed by the contracting officer shall be provided to keep erosion to a minimum.

* * * * *

5-206. *PAYMENT. A. Permanent Access Roads.* Culverts, gravel, crushed aggregate, and riprap, if required by the contracting officer, will be paid for as described in the preceding chapter. No measurement and no payment will be made for road construction and improvement.

Mr. E. P. DeFeyster, President of appellant, who has been in the electrical construction business since 1937, made an aerial and ground survey of the work site prior to submitting a bid. (Tr. 78, 79, 83, 84.) He also relied on reports of Power City personnel who had visited the job site. He estimated that he observed approximately 25 percent of the access roads. When asked what he contemplated was included under that item of the invitation, he replied:

Well, I expected that reasonable access to the site of the work would be provided by the Government; and that the existing access road system would be improved to allow the movement of construction equipment, materials, personnel to the site of the work. (Tr. 80.)

Under cross-examination, he repeated this understanding of what was encompassed under access road improvement (Tr. 85, 89, 90). He admitted that prior to bidding he was of the opinion that the estimated quantity of 400 stations probably would be exceeded. His principal concern, however, was in developing a reasonably accurate unit

price for road improvement. He, therefore, made no attempt to check the accuracy of the Government's estimate. (Tr. 85, 86.) Power City's bid price for the improvement of access roads was \$100 per station.²

After award of the contract, appellant requested the list of specific areas which would be designated for improvement and for which payment would be made (letter, dated October 21, 1970, Item 2). Appellant had previously advised Bonneville representatives that it would have to be paid for more than 40,000 feet of road improvement in order to move its 60 ton crane³ to the site of the work.⁴ The list of "Access Road Improvement For Pay" totaling 39,630 feet was furnished appellant by letter, dated October 27, 1970 (Item 4). The list identifies particular roads⁵ and footage on these roads to be improved, but does not identify by station number or

² Of the six bids received, three were at \$100 per station, one was at \$75, one at \$108 and one at \$120 per station. (Abstract of Bids, Bid No. 1010, App's. Exh. A.)

³ Appellant contemplated using, and did use, a P&H, 650 truck crane for erection of the towers (Tr. 80; photos, App's. Exhs. C, C-1 and C-2). Although the Chief of Line Construction for Bonneville was of the opinion that the work could have been performed with a smaller crane of 35- or 40-ton capacity (Tr. 50, 51), we accept the testimony of other witnesses that the crane used by Power City was a reasonable one for this work (Tr. 12, 104).

⁴ Memorandum, dated October 23, 1970, Item 3. The memorandum concludes with the following: "We will not dispute the fact that the contractor will likely have to grade 50 or 60 miles of road to get a 60 ton crane over them but we had only estimated to pay for 40,000 feet of it."

⁵ Access roads are identified by initials and number. For example, PO-GB-AR-29R stands for Port Orford-Gold Beach Access Road No. 29R.

otherwise the particular areas to be improved. Appellant refused to accept this list as fulfilling Bonneville's obligation for access road improvement under the contract.

The list of access roads upon which Bonneville intended to pay for improvements was developed by Bonneville inspectors and was available prior to the time the invitation covering work on the project was issued (Tr. 9, 10, 37, 41). The estimate of 40,000 feet of road improvement for pay contained in the invitation was based on this list totaling 39,630 feet. Neither this list nor any other designation of particular road improvements intended by Bonneville was included with the invitation. The evidence is conflicting as to the basis upon which this list was developed. Mr. Jack Petterson, a supervisory construction representative for Bonneville, testified that the list was based upon their opinion as the stretches of the road needing improvement in order for maintenance personnel to patrol the line. (Tr. 10.) He asserted that such reconnaissance was conducted perhaps twice a year and required nothing larger than 4 x 4, which he described as a "pickup." (Tr. 10, 11.) However, Mr. Tom Wagenhoffer, Chief of Line Construction for Bonneville, testified that the list was compiled by Mr. Dennis Ferguson, a Bonneville inspector, and was based upon the need for patrol and routine maintenance, which would require a line truck and maybe a trailer (Tr. 43, 45-47). He admitted that improvements to the roads on

the list would not bring all access roads to contract specifications, which require, *inter alia*, a road 14 feet in width exclusive of ditches. He asserted that he forwarded the list to the "specifications people" but that it was not the function of his section to determine whether such a list was included in the specifications (Tr. 44).

The task of flagging specific sections of access roads for improvement for pay was performed by Mr. Stanley Morris, construction inspector for Bonneville (Tr. 68, 73). He testified that he was given the list and told to improve according to the list. It was his understanding that he was to stake 40,000 feet of road for improvement. Since there were no stations on the list, he asserted " * * * all you could do was just pick out your worse places and widen your corners to fit the footage we had." (Tr. 73.) When the areas flagged for improvement on a particular road equalled the footage on the list for that particular road, he did not flag any more areas for improvement on that road, irrespective of its condition.⁶ When Power City representatives inquired as to why there wasn't more improvement on particular roads, Mr. Morris' reply was "It ain't on the list." (Tr. 76.) He attributed the small overrun in road improvement (road improvement for which payment was authorized totaled 410.70 stations, Partial Payment Estimate

⁶ Tr. 74-76. This condition is well illustrated by photos (App's Exhs. F and I) showing particular sections of road flagged for improvement, while other sections, apparently in equally poor condition, were not so flagged.

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No. 15, Item 33) to the need to satisfy property owners.

Correspondence in the record delineates the positions of the parties in this dispute. In a letter to appellant, dated November 9, 1970 (Item 6), the provisions of the specifications were emphasized providing (Section 5-102) that the contractor shall construct or improve access roads in locations specified by the drawings, by the specifications and by the contracting officer, and providing (Section 5-111) that payment would be authorized only for that access road work required by the specifications, drawings and the contracting officer. Power City was informed that the Government did not intend to pay for any access road improvement in excess of that contained in the list previously furnished or for gravel in other locations than those designated by Bonneville's representatives in the field. Since it is undisputed that neither the drawings nor the specifications designated any particular roads for improvement (Tr. 136, 137), the access road improvement for which payment would be made was solely within the discretion of the contracting officer.⁷

Power City relies, *inter alia*, upon the provisions of the specifications relating to the improvement of

existing access roads and in particular (5-104. C) providing essentially that the existing roadway shall be improved to the line and grade as originally constructed or to the cross section shown on the drawings for new road construction, whichever is greater. Power City also relies upon Section 2-115 stating that quantities in the schedule are estimated and that the contractor would be required to furnish and place the entire quantities necessary to complete the work specified (letter, dated November 11, 1970, Item 7). Thereafter, appellant informed Bonneville that it was proceeding with the improvement of existing contract roads under protest and that a claim for reimbursement would be filed (letter, dated November 20, 1970, Item 11).

By letter dated November 4, 1971, appellant submitted a schedule reflecting that 1,693.30 stations of access road had been improved (Item 31). Deducting the 410.70 stations for which payment had been authorized, appellant requested payment for an additional 1,282.60 stations, which at the contract price totals \$128,260. The schedule refers to portions of at least two access roads (B-GB AR 20-1 and B-GB AR 44-1) which the drawings (Govt's. Exh. 1(a)) indicate were on the list of roads to be constructed in part. This work was to be accomplished under a separate contract by the clearing contractor. Presumably, the areas on these roads for which claim is made do not include

⁷ Mr. Wagenhoffer acknowledged this to be the case on cross-examination:

"Q. So really, they [drawings and specifications] don't mean anything, so what we can really say then, is that 'the contractor shall construct or improve access roads in locations specified by the Contracting Officer,' period, is not that the interpretation that you have taken?

"A. Yes." (Tr. 137.)

the areas constructed by the clearing contractor.

In the letter referred to above, appellant alleged that a total of 317 water bars had been installed incident to road improvement and, deducting the 20 required by Section 5-101.B of the contract, requested payment for an additional 297 water bars at \$60 each. Appellant's letter of November, 12, 1971 (Item 35), states that these water bars were installed at the direction of Government inspectors. Appellant further alleged that quantities of culvert pipe exceeded the estimated quantities by amounts ranging from 175 to 1,816 percent and pointed out that this could entitle the contractor to a price adjustment under the contract. Partial Payment Estimate No. 15 (Item 33) reflects that appellant was paid for the above overruns in culvert quantities and for an overrun of 185 percent in bid item seven, gravel.⁸ The record does not reflect whether appellant has been paid for the overrun in water bars.

The evidence is not clear as to the extent of improvements on the roads involved in the claim. Mr. Lawrence Johnson, general foreman for Power City, testified that under appellant's interpretation once it was determined that an access road

needed improvement in order to bring material and equipment to the site, the road was required to be improved to contract specifications (Tr. 124). He asserted that roads shown on photos (App's Exhs. F, G, H and I) were representative of the entire access road system (Tr. 124, 125). He estimated that 90 percent of the road (P.O. GB-AR11) depicted on four photos (App's. Exh. I) was improved to contract specifications.⁹ He further testified: "* * *, but then, when we were building them [roads], they [Bonneville representatives] did tell us that if we did build it [sic], we had to take care of it and maintain it and treat it as if it were a contract access road. I mean, if they wanted out-slope or water bars, or such as." (Tr. 126, 127.)

During the examination of Mr. Wagenhoffer, the following colloquy ensued:

Q. * * *. Maybe if I phrased it this way: If those sections were improved, other than those stations indicated, and it was on what you deem to be the permanent access road systems, did you require the Contractor to bring all those roads up to contract specifications?

A. No. If I understand you properly, aside from those 400 stations of improvement, the other roads in the system, did we require the Contractor to bring them up to * * * (interrupted).

Q. Contract specifications, if he did any work on them.

A. If he did any work on them?

Q. Yes.

A. No, we did not.

Q. You did not?

⁸ To justify the apparent difference in result, the Government relies upon Section 5-206 under Chapter 2, Non-Contract Access Roads, which provides as to permanent access roads that "Culverts, gravel, crushed aggregate, and riprap, if required by the contracting officer, will be paid for as described in the preceding chapter." (Tr. 62, 63.) The problem with this position is that Section 5-206 is by its terms applicable only to those roads on the line right-of-way which became part of the permanent access road system.

⁹ Tr. 123. The record indicates that 4,000 feet of this road was improved for pay (Tr. 128; Schedule of "Access Road Improvement for Pay," Item 3).

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A. Not that I can recall, no.

Q. Did you, in any instances, require him to bring them up to * * * (interrupted).

A. We told him he would be responsible to. We also indicated to him that we were not going to pay for them.

Q. But did you require him then to bring it up to contract specifications?

A. Well, primarily from a drainage standpoint, because he altered many of the road bends, which later on required additional culverts and rock, and so on.

* * * * *

Q. And wherever he improved the road, for what you term to be his own convenience, at that point, didn't you require him then, to bring it up to contract specifications, as far as your water problems and so forth?

A. Yes, that was part of the contract, that he had to, anytime he used the road, he was responsible to perform current maintenance, which, in turn, meant drainage facilities, or whatever necessary to control the road. (Tr. 57, 58.)

Mr. Petterson admitted that in many cases of roads improved by appellant in order to move its equipment to the site, referred to as "convenience roads," Bonneville did require the road to meet contract specifications (Tr. 34, 35). He stated "* * * If there was no purpose in draining the road, then the only thing he did was to blade the road. If there was a purpose for ditching the road, we required him to ditch it." (Tr. 36.) In later testimony, he asserted that on convenience roads Bonneville did not require any particular standard unless there were additional drainage features required (Tr. 143). He indicated that, in general, less work was required on the stations in-

volved in the claim than on the pay stations.¹⁰ However, he was unable to make any estimates as to the percentages of stations involved in the claim which were brought to contract specifications.

The contracting officer denied the claim (Finding of Fact and Decision, dated December 17, 1971 (Item 41)). He found that the Government in preparing the specifications, knew that its requirements were for the improvement of 40,000 feet of access roads and that the contract provides for the contractor to perform access road improvement on rights-of-way acquired by the Government at its own expense if it believes such improvements necessary for its own needs. He further found that the contractor should have determined the improvements necessary to move its equipment to the site as provided in Clause 13 of the General Provisions and that the contractor performed work on access roads which was not required by the Government.

The record is clear that convenience or non-contract access roads are those on the line right-of way (Tr. 26, 53-55, 61, 62, 83 and 101). These roads were part of the Government's permanent road system, and even though these were "no pay" roads,

¹⁰ Tr. 143, 144. This testimony was for the obvious purpose of reducing the amount of recovery if liability was found. However, the contract price per station is necessarily an average as was conceded by Mr. Wagenhoffer (Tr. 48). The fact that more work may have been performed on pay stations is consistent with the Government's evidence that only the areas in the worst condition were flagged for pay.

such roads had to be constructed to the standard of a contract road, if newly constructed (Tr. 65). However, there are instances when roads which cross the line right-of-way are designated as pay roads (Tr. 65, 66, 131, 132; App's. Exh. B). Mr. Wagenhoffer testified that these were rare occasions and had been primarily on Forest Service Roads which crossed the line right-of-way two or three times during the length of the line. He conceded that there was nothing in the specifications which would enable a contractor to ascertain that any such road would be improved for pay (Tr. 66).

The claim does not include any roads on the line right-of-way (Tr. 82, 83). Roads on the line right-of-way are not shown on the drawings. Roads improved by Power City for which claim is made are those roads Power City considered necessary to improve in order to move materials and equipment to the site (Tr. 124, 125). Roads to the standard of the specifications were adequate for this purpose (Tr. 94). Mr. Petterson and Mr. Wagenhoffer conceded that the access road system as reflected in the drawings was necessary for the performance of the contract (Tr. 25, 56).

The third low bidder on this project was Pettijohn Engineering Co., Inc. (Tr. 97; App's. Exh. A). Pettijohn's bid price for road improvement was \$108 per station. Mr. E. I. Pettijohn, who had been engaged in heavy power line construction since 1938, testified that he was active in the preparation of his

firm's bid for this project and that he personally made a site inspection (Tr. 98). He stated that the condition of the access roads, as shown in the plans and specifications, was below the standards required to perform the line work on this size of a line. When asked how he expected that his firm would be compensated for bringing those roads up to the specification, he replied: "The unit price is [sic] quoted as \$108 a station would be the lineal feet of road required to be improved, and brought to the drawings [sic] and standards as shown in the contract documents." (Tr. 98.) He asserted that the unit price as quoted, as was true for each of the unit prices in the bid, included the cost of men and equipment, field and office overhead and a reasonable profit (Tr. 99). Although he admitted to anticipating that there would be substantially more roads to be improved than shown in the bid estimate, he made no inquiry of Bonneville as to the estimated quantities. He gave as a reason the fact that "It's not unusual for estimated [actual] quantities to vary substantially from that shown in the contract documents." (Tr. 100.)

Affidavits (App's. Exh. D & E) submitted by the second and fourth low bidders, Wire Installation Contractors, Inc., and R. C. Hughes Corp., respectively, are to the effect that these bidders interpreted the invitation in essentially the same manner as did appellant and that they expected to be paid at the contract unit price for all stations of

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contract access road improved in order to allow material and equipment to be moved to the site.

Decision

For reasons hereinafter stated, we conclude that appellant's interpretation of the invitation must be held to be reasonable and that the only real question is whether appellant's failure to raise the matter of the validity of the estimated quantities with Bonneville operates to deny the claim.

Section 2-115 entitled "Quantities and Unit Prices" provides that the total estimated quantities necessary to complete the work as specified are listed in the "Schedule of Designations and Bid Prices." The contractor is required to furnish and place the entire quantity necessary to complete the work as specified, whether it is more or less than the estimated quantities. Under this provision it is reasonable to conclude that quantities necessary to complete the work are measurable by some objective standard set forth in the contract.

Access to the right-of-way was to be from intersecting or adjacent public roads and any access roads and access road rights-of-way for which rights have been acquired by the Government (Section 3-103 entitled "Accessibility of Site"). Paragraph B of this section provides that the contractor may at his expense construct additional roads and other means of access within the boundaries of the line right-of-way and on undeveloped access road

rights-of-way acquired by the Government¹¹ upon approval of location and type by the contracting officer. Paragraph D of this section provides in part that the contractor shall be solely responsible for use and occupancy of any private lands crossed by him in securing such additional access from public roads and from Government-acquired access roads as he finds necessary for his operations. This section makes it reasonable to conclude that generally the additional access roads which the contractor may construct at his own expense are those on the line right-of-way. Existing roads are not considered "undeveloped" even if unimproved.¹² If the contractor requires access roads or rights-of-way in addition to those shown on the drawings, it is the contractor's responsibility to construct or obtain them.

Contract access roads are defined in Part V, Chapter 1, Section 5-102 of the specifications as "access roads required to be constructed or improved by the specification or by supplemental orders from the contracting officer * * *." This section further provides that the contractor shall construct or improve access roads in locations specified by the drawings, by the specifications, and by the contracting officer. As we have seen, it is undisputed that neither the drawings nor the specifi-

¹¹ Mr. Wagenhoffer testified that undeveloped to him meant a road that had not been constructed (Tr. 52). He indicated, however, that access roads shown on the drawings would be developed even if unimproved.

¹² Note 11, *supra*. Existing access roads had been constructed some 20 years ago (Tr. 27).

cations designated any particular sections of access road for improvement. Under Section 5-111 payment was to be authorized only for that access road work required by the specifications, drawings, and the contracting officer.

Non-contract access roads are defined as those roads on the line right-of-way constructed for the contractor's convenience (Section 5-201). All costs of contracting and improving these roads were to be borne by the contractor. Non-contract access roads are divided into two types: permanent and temporary. Permanent access roads are those that provide access to tower or structure sites and are to be constructed or improved to the same standard as contract access roads. Temporary access roads (Section 5-203) are those that provide access to landings and yarding areas and which are not to be incorporated into the Government's permanent access system. Temporary access roads were to be destroyed upon completion of the work and the land restored to its original cross section.

Bearing in mind the requirement of Section 2-115 that the contractor would be required to complete the work specified whether more or less than the estimated quantities and Section 3-103.B providing that the "contractor may at his expense construct additional roads and other means of access within the boundaries of the line right-of-way" and reading Section 5-102 in conjunction with Section 5-201 *et seq.*, we think that a bidder or contractor could reasonably conclude that the

distinction between "contract" and "non-contract" access roads was related to whether payment would be made for their improvement as well as their location on or off the right-of-way. Access roads shown on the drawings were all off of the right-of-way and another way of phrasing the foregoing would be that the contractor could expect to be paid at the contract unit price for all Government-acquired roads shown on the drawings which were improved to the standards of Section 5-104, providing their improvement was necessary for the primary work which was construction of the line.

The Government argues that bidders were essentially told that Bonneville would pay for 40,000 feet of road improvement and that "* * * bidders should expect to be paid for only the quantity of roads specified by the Contracting Officer with a possibility of some overrun or underrun." (Post-Hearing Brief, pp. 1, 2.) The problem with this position is that whether there was an overrun or underrun was not ascertainable by any standard set forth in the contract.¹³ The contracting officer's finding that the Government had determined that its needs were for the improvement of 40,000 feet of access roads and the assertion (Post-Hearing Brief, p.

¹³ Appellant points out and the record establishes that Bonneville's interpretation allowed it to pick and choose between access roads to be improved for pay and, indeed, between stations of the same access road with the result that portions of an access road were flagged for improvement for pay while portions of the same road in equally poor condition were not so flagged. Appellant asserts that it is unreasonable to expect a bidder to anticipate such a result.

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2) that this need was based on access by nothing larger than a 4 x 4 truck can avail the Government nothing since this standard was not set forth in the invitation and resulting contract.¹⁴

The Government also argues that the contract cannot reasonably be read as containing any warranty express or implied, that the access road system would be suitable for the contractor's construction requirements and that the contractor would be paid for making the road suitable. We can agree with this contention and the authority cited by the Government¹⁵ without altering the result since we find the argument inapposite. Appellant's contention is not that there was a warranty of access but that it reasonably concluded that existing [Government-acquired] access roads either were or would be brought to the standards of Section 5-104. The record is clear that roads to the standards of the specifications were adequate for appellant's pur-

poses. If access roads to these standards were insufficient for access by appellant's equipment or if access roads in addition to those shown on the drawings were required, we think it clear that it was appellant's responsibility to provide them.

We turn to the Government's most serious contention, *i.e.*, that the pre-bid site investigation should have alerted appellant to the fact that under its interpretation of the invitation there was a substantial under-estimate of the quantities of road improvement and of the need to inquire of Bonneville as to what was intended in this regard. Representatives of the bidders who testified, Mr. DeFeyter of appellant and Mr. Pettijohn of Pettijohn Engineering Co., Inc., readily admitted that they considered Bonneville's estimate of the quantity of road improvement would be exceeded. However, they defended their failure to bring this matter to the attention of Bonneville upon the ground that under the terms of the invitation their concern was to develop a reasonably accurate unit price for road improvement and on the further ground that it was not unusual for there to be substantial variances between estimated and actual quantities. Assuming the validity of this latter assertion, the question presented is whether a bidder on notice of a potential substantial overrun in estimated quantities is on notice of an error in specifications and is required to bring this situation to the attention of the Government.

¹⁴ See *Ets-Hokin Corp. v. United States*, 190 Ct. Cl. 668 (1970); *Firestone Tire & Rubber Co. v. United States*, 195 Ct. Cl. 21 (1971). See also *Erhardt Dahl Andersen, Inc. v. United States*, 473 F.2d 1372 (7th Cir. 1973). In the cited case the contract provided that access to the work site would be provided through designated state and county roads. In rejecting the contractor's claim for extra costs incurred when a spring thaw made one of the designated roads impassable, the Court ruled that the language used was merely descriptive of available access roads and that a fair reading of the contract made it evident that the Government had not assumed the obligation of correcting the situation which developed. The Court was careful to note that there was no inadequate disclosure of facts known to the Government and unknown to the plaintiff.

¹⁵ *Premier Electrical Construction Company v. United States*, 473 F.2d 1372 (7th Cir. 1973). In the cited case the contract provided that access to the work site would be provided through designated state and county roads. In rejecting the contractor's claim for extra costs incurred when a spring thaw made one of the designated roads impassable, the Court ruled that the language used was merely descriptive of available access roads and that a fair reading of the contract made it evident that the Government had not assumed the obligation of correcting the situation which developed. The Court was careful to note that there was no inadequate disclosure of facts known to the Government and unknown to the plaintiff.

It appears to be settled law that, in the absence of language requiring a bidder to make its own determination of quantities, a contractor is generally entitled to rely on the reasonable accuracy of Government estimates.¹⁶ This being true no reason is apparent why a prospective bidder on notice of a substantial overrun should not be expected to seek clarification or risk having the interpretation of the contract resolved against him.¹⁷ Application of this rule here would require denial of the claim for, although we have found appellant's interpretation of the invitation reasonable, a site investigation in conjunction with the estimated amount of road improvement makes it equally reasonable to conclude that appellant was on notice of a possible error in specifications and it is evident that appellant's assumption that access roads shown on the drawings either were or would be brought to the standards of the specifications was favorable to the contractor.¹⁸ Neverthe-

less, under the circumstances present here, we decline to apply the rule for the reason that the time the invitation was issued the Government had in its possession material information, *i.e.*, the list of access road improvement for pay, which it failed to disclose.¹⁹ When the Government enters into a contract, as part of its implied duty to help rather than hinder performance, it is obligated to provide the contractor with special knowledge in its possession which might aid the contractor in performing.²⁰ The courts and the Boards have taken an increasingly stringent attitude toward the withholding of information the disclosure of which would be likely to have a material effect on a contractor's estimate of costs.²¹ We, therefore, hold that any possible duty of appellant to make inquiry has been nullified by Bonneville's failure to disclose the access road improvement list which according

¹⁶ See *Norfolk Dredging Company v. United States*, 175 Ct. Cl. 594 (1966) (upholding a Board decision to the effect that a substantial underrun from estimated quantity constituted a changed condition); *Barringer and Botke*, IBCA-428-3-64 (March 23, 1966), 66-1 BCA par. 5458 (contractor entitled to rely on estimates where error was not discoverable upon a reasonable site investigation or from examination of Government drawings.) Cf. *Kreider Bros.*, IBCA-545-2-66 (April 5, 1967), 67-1 BCA par. 6260 (overruns and underruns from estimates do not in themselves constitute changed conditions).

¹⁷ *Beacon Construction Co. v. United States*, 161 Ct. Cl. 1 (1963). Cf. *Mountain Home Contractors v. United States*, 192 Ct. Cl. 16 (1970).

¹⁸ It has been stated that:

"This tendency on the part of contractors to assume too much is rather widespread." McBride & Wachtel, *Government Contracts*, Section 2.170[4] at 2-360.

¹⁹ See, e.g., *G. W. Galloway Company, ASBCA* Nos. 16656 and 16975 (September 19, 1973), Slip Opinion at 55: "None of the foregoing important information was disclosed to appellant prior to bid opening, but under the rulings in *Boland* [ASBCA No. 13864 (October 28, 1970), 70-2 BCA par. 8556], *Helene Curtis*, [160 Ct. Cl. 437 (1963)] and *Bateson-Stolte*, [145 Ct. Cl. 387 (1959)] it should have been. Failure to do so imposes liability on the Government for the excess costs incurred by appellant on account of the defective tools. The "as is" disclaimer of warranty is not a defense under the circumstances of this appeal."

²⁰ See *Aerodex, Inc. v. United States*, 189 Ct. Cl. 344 (1969).

²¹ *Hardeman-Monier-Hutcherson v. United States*, 198 Ct. Cl. 472 (1972); *Maryland Painting Company*, Eng. BCA No. 3337 (August 17, 1973), 73-2 BCA par. 10,223; *F. F. Slocomb Corporation*, ASBCA No. 16715 (August 20, 1973), 73-2 BCA par. 10,209; *Etrich Construction Co., Inc.*, GSBCA No. 3657 (August 10, 1973), 73-2 BCA par. 10,187.

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to the Government's own admission contained the only improvements necessary for its needs and was based on standards not specified in the contract. On balance, the appellant's fault was less serious than the Government's fault.²²

No duty of inquiry being present, there is for application the rule that ambiguities will be construed against the drafter.²³ It follows that appellant's position must be sustained. Liability having been found, quantum would ordinarily be the number of stations improved times the contract unit price less any payments for stations of road improvement previously made. However, as we have seen, the record is unclear as to whether road improvement at all stations for which claim has been made were to specification requirements. Accordingly, we conclude that it is appropriate to remand²⁴ this matter to the contracting officer for determination of the amount due based upon such information as is or may be made available to him. If the parties are unable to agree,

appellant may, of course, again appeal to this Board.

CONCLUSION

The appeal is sustained.

SPENCER T. NISSEN, *Member*.

WE CONCUR:

WILLIAM F. MCGRAW, *Chairman*.

SHERMAN P. KIMBALL, *Member*.

K SQUARE CORPORATION A/K/A ULTRASCAN COMPANY

IBCA-959-3-72

Decided November 29, 1973

Contract No. 14-08-0001-12024, Geological Survey.

Sustained.

Contracts: Disputes and Remedies: Termination for Default—Contracts: Performance or Default: Acceptance of Performance—Contracts: Construction and Operation: Warranties—Contracts: Disputes and Remedies: Termination for Convenience

Under the Standard Form Supply Contract Default clause, a termination for default, following acceptance, of a contract for the purchase of a scanning electron microscope on the grounds it was defective, latently, and by virtue of various breaches of warranty, was improper in the absence of a notice preceding the termination affording the contractor at least ten days within which to cure the defects, and was, accordingly, treated as a termination for the convenience of the Government.

²² See *Helene Curtis Industries, Inc. v. United States*, 160 Ct. Cl. 437, 444 (1963).

²³ *John M. Kelch, Inc.*, IBCA-831-3-70 (June 21, 1971), 71-1 BCA par. 8914, affirmed on reconsideration (Aug. 13, 1971), 71-2 BCA par. 9038.

²⁴ Under quite similar circumstances, we have remanded matters left unresolved by the contracting officer. *James Hamilton Construction Company and Hamilton's Equipment Rentals, Inc.*, IBCA-493-5-65 (July 18, 1968), 75 I.D. 207 at 218-19, 68-2 BCA par. 7127 at 33,035. See also *Bergen Construction, Inc.*, GSBICA No. 1058 (November 20, 1964), 65-1 BCA par. 4554 at 21,817-818. Cf. *Charles R. Shepherd, Inc.*, ASBCA No. 13412 (October 20, 1970), 70-2 BCA par. 8531 at 39,663-664 (on reconsideration).

APPEARANCES: Mr. Henry T. Benedetto, Treasurer, K Square Corporation a/k/a Ultrascan Company, Cleveland, Ohio, for appellant; Mr. Edward G. Ketchen, Department Counsel, Washington, D.C., for the Government.

OPINION BY MR. KIMBALL

*INTERIOR BOARD OF
CONTRACT APPEALS*

On June 27, 1969, the Government awarded a contract for the purchase of a scanning electron microscope from the appellant for \$74,650. The instrument was installed in September 1969, thereafter rebuilt and finally accepted in February 1971. Subsequently, by notice dated February 16, 1972, the contracting officer terminated the contract for default, on the ground that the microscope was "defective" and "not acceptable," thereby precipitating this appeal.¹

The Government's action was taken under two provisions of the contract and two sections of the Uniform Commercial Code relating to implied warranties. According to the Government, the appellant failed to comply with the "Guarantee of Equipment" clause²

¹ The Government seeks the return of the purchase price, plus incidental and consequential damages of \$9,618, or a total recovery of \$84,268. The damages are based upon employees' "time spent * * * in working with the defective instrument." Government Post-hearing Brief 59-60.

² "The equipment delivered, and the services performed under this contract shall be guaranteed against defective design, workmanship, material, and deviation from the operating specifications of the contract for a period of one year. Any defective design, workmanship, material, or deviation in operation from the contract specification within the one year

contained in the specifications and breached the implied warranties of merchantability and fitness for a particular purpose.³ The assertion has also been made that acceptance was not conclusive, having been induced by gross mistakes amounting to fraud, and the defects being latent, as provided for by paragraph (d) of the Inspection clause.⁴

The Facts

A scanning electron microscope is essentially a closed-circuit television system in which the subject of the picture is illuminated by a beam of electrons.⁵ It achieves much higher resolution than an ordinary light microscope because electrons are utilized which have a much shorter wavelength than visible light. The shorter the wavelength used in microscopy, the higher the resolution.

period shall be repaired, replaced, or corrected by the Contractor without cost to the Government. The guarantee period shall start on the date of the Government's acceptance after the Contractor's demonstration of satisfactory operation." By letter dated February 26, 1971, the appellant agreed to extend the warranty period beyond one year to March 16, 1972 (Appeal File, Tab A6). Unless otherwise indicated, all subsequent references to exhibits are to those in the appeal file.

³ Uniform Commercial Code Secs. 2-314, 2-315.

⁴ "5. * * * (d) * * * Except as otherwise provided in this contract, acceptance shall be conclusive except as regards latent defects, fraud, or such gross mistakes as amount to fraud." Standard Form 32 (June 1964 edition) incorporated by reference in the contract (Solicitation, Offer and Award, Standard Form 33, 1966 edition, p. 1) (Tab C).

⁵ The description of the operation of a scanning electron microscope and its various parts is based upon Everhart and Hayes, *The Scanning Electron Microscope*, SCIENTIFIC AMERICAN, January 1972, pp. 55-69 (Joint Exhibit AA); Ultrascan SM 2-012 Scanning Electron Microscope Operating Manual, pp. 3-5 (Appellant's Exhibit H).

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Images are ultimately seen on a cathode ray tube and have a three-dimensional quality.

The beam of electrons (known as primary electrons) originates at a highly negative cathode heated by current. The electrons emitted are accelerated by an electron gun from the cathode through a grid and then through an anode, that is at ground potential, down the electron optics column.

The beam of electrons is focused onto the subject by magnetic lenses. Sets of deflection coils inside the objective lens deflect the beam across the surface of the subject in a raster pattern. A set of stigmator electrodes corrects any lens astigmatism. When the primary electrons strike the subject they give rise to secondary electrons. The secondary electrons are collected by a detector and produce a scanning electron micrograph.

Acquisition of the microscope was intended to enable fossil specimens to be viewed at high magnification and to be photographed for use as illustrations in scientific publications.⁶ Commencing shortly after delivery in September 1969, however, the instrument was allegedly beset by various problems which prevented the Government from utilizing it for the purposes for which it was purchased. Eventually the microscope was returned to the contractor on March 31, 1970,

and, after rebuilding, was reinstalled on October 20, 1970.⁷

Further correction and repairs by the appellant were necessary⁸ subsequent to redelivery. Ultimately, on February 12, 1971, the Government accepted the microscope, following a demonstration of satisfactory operation, as required by the Guarantee of Equipment clause.⁹

According to the Government, shortly after acceptance took place, various "defects, deficiencies and malfunctions" began to occur, some of which had not arisen previously, but many of which were similar to problems of the pre-acceptance period.¹⁰ As a result, Mr. David Massie, the operator of the microscope, estimated at the hearing that its "down time" for repairs was 50 percent.¹¹ Instead of being able to take 75 pictures a day which he maintained was possible with a functioning instrument, he allegedly only could take "something on the order of 30 to 50 total" during the entire existence of the contract.¹²

⁷ Memorandum of David H. Massie, dated December 9, 1971, p. 4 (Tab A5).

⁸ Appellant's letter, dated January 25, 1971, attached to Government's letter, dated January 29, 1971 (Tab B).

⁹ A formal document of acceptance dated February 12, 1971, and executed by Norman F. Sohl for the Government is attached as Appendix I to the appellant's complaint. In its letter dated February 22, 1971, the Government stated that "official acceptance of the instrument was accomplished on February 16, 1971." (Tab A6.) We regard the formal document of February 12, 1971, as the best evidence of acceptance and controlling.

¹⁰ Government's Posthearing Brief, 10; Tr. 9.

¹¹ Tr. 357. Between October 1969 and February 1971, the instrument could be used only 10% of the time, according to Mr. Massie (Tr. 79).

¹² Tr. 164. 357.

⁶ Memorandum of Norman F. Sohl, dated February 16, 1972 (Tab A3).

At the hearing Mr. Massie testified extensively regarding the various malfunctions that occurred, relying upon logs that he, or at times his supervisor, Mr. K. Norman Sachs, Jr., maintained in connection with the microscope.¹³ Between the period commencing February 18, 1971, shortly after acceptance, to January 19, 1972, one month before termination, the following problems are said to have developed: aperture micrometer leaks; inoperative stage motion; scan generator malfunction; malfunction and drift in the magnification meter; failures of the Granville-Phillips vacuum pump; failure of printed circuit boards; scratched pole pieces allegedly caused by objective aperture bar; poor image quality; gun control malfunction; failure of the Hastings vacuum gauge; failure in the high and low voltage power supplies; erratically functioning solenoid valve; warped and melted aperture bar and strips allegedly caused by the electron beam; failure of the automatic sequencing set-up of the vacuum system; inoperative objective valve; damaged pole pieces, allegedly caused by the electron beam; inoperating tilt and rotation unit; and damaged anode of the electron gun, allegedly caused by the electron beam.¹⁴

Most frequently the difficulties in-

volved the functioning of the scan generator and the magnification meter.¹⁵ A scan generator controls the electron beam movement and is regarded as the "heart" of the microscope's electronic system.¹⁶ The meter measures the approximate magnification achieved.¹⁷

As a result of the defects and malfunctions, Dr. Norman F. Sohl, Chief of the procuring agency's paleontology and stratigraphy branch, stated that during the total time the instrument was in its possession "sufficient photographs of suitable quality to illustrate even one single report" could not be obtained.¹⁸ In his decision terminating the contract, pursuant to Clause 11(a) of the General Provisions, the contracting officer found that the appellant made 18 service calls since acceptance took place, but the instrument operated unsatisfactorily.¹⁹

¹³ Tr. 237.

¹⁴ Appellant's Exhibit H, note 5, *supra*, p. 5.

¹⁵ *Id.* at 49.

¹⁶ Tr. 292-93; note 6, *supra*.

¹⁷ Contracting Officer's letter, dated February 16, 1972 (Tab A2). Clause 11(a) of Standard Form 32 reads:

"11. DEFAULT

"(a) The Government may, subject to the provisions of paragraph (c) below, by written notice of default to the Contractor, terminate the whole or any part of this contract in any one of the following circumstances:

"(i) if the Contractor fails to make delivery of the supplies or to perform the services within the time specified herein or any extension thereof; or

"(ii) if the Contractor fails to perform any of the other provisions of this contract, or so fails to make progress as to endanger performance of this contract in accordance with its terms, and in either of these two circumstances does not cure such failure within a period of 10 days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure."

¹³ Tr. 27. The logs consist of two volumes, titled SEM Log I and SEM Log II (Government's Exhibits 2A and 2B). In Log I, the first entry is dated September 5, 1969, and the last entry is dated November 9, 1971. In Log II, the first entry is dated November 10, 1971, and the last entry is dated April 19, 1972.

¹⁴ Memorandum of David Massie, dated February 16, 1972 (Tab A3); Government's Post-hearing Brief, 39 (incorrectly numbered "40").

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Appellant contends that the microscope was mishandled by the Government's operator, Mr. Massie. In letters dated July 30, 1971, and January 18, 1972, to neither of which any substantive reply was received, the appellant complained to the Government that Mr. Massie was calling upon it unnecessarily to perform cleaning and minor adjustments which were ordinarily performed by its customers.²⁰ While admitting that some malfunctions occurred, they were not, according to the appellant, of such nature or frequency as to prevent satisfactory operations.²¹ It is, therefore, the appellant's view that termination for default was unjustified.

Decision

This appeal has raised a variety of legal and factual issues. Among them are the following: Of what relevance are the deficiencies and malfunctions that occurred prior to acceptance? Has the appellant complied with the express provisions of the Guarantee of Equipment clause? If not, does noncompliance constitute such a failure to perform as justifies a termination for default? Are the warranties of merchantability and fitness for a particular purpose of the Uniform Commercial Code implied provisions of this contract, or are they negated by the presence of express provisions? If the implied warranties are applicable and have not been met, does the failure to per-

form such a provision of the contract constitute a default for which termination is appropriate? Or, is termination for default for any reason other than the exceptions contained in the Inspection clause barred by the finality of acceptance?

Still other questions raised are: Has the Government met its burden of establishing that acceptance was not conclusive because it was induced by gross mistakes amounting to fraud? Were the defects and malfunctions of the instrument brought about by the Government's improper use? Or, has the Government met its burden of establishing the existence of latent defects at the time of acceptance not discoverable by reasonable inspection and that such defects were the most probable cause of the microscope's failure to operate properly?

We need not decide any of these questions, however, although we will touch upon some of them in passing, because one issue that has not been raised is paramount. It turns upon a provision of the Default clause of the contract and its resolution is determinative of the appeal. We are obligated to consider the point even though neither party has broached it.²²

²² *John A. Johnson Contracting Corp. v. United States*, 132 Ct. Cl. 645, 656 (1955) ("* * * No fault is imputed to the Board in failing to see that the real problem, under the contract, was one not urged by the parties. * * * The plaintiff's failure to analyze with greater nicety the appropriate theory for its claim should not have the effect of a forfeiture of its rights. * * *"); *Onus Company*, ASBCA No. 16706 (October 5, 1972), 72-2 BCA par. 9722.

²⁰ Tab A4, A6.

²¹ Appellant's Posthearing Brief, 27.

A default termination is a drastic sanction the exercise of which should be sustained only upon a demonstration of full compliance by the Government with the established procedural safeguards and substantive requirements applicable.²³ Under paragraph (a) of the Default clause the Government may terminate a contract on the following grounds: (i) if the contractor fails to deliver the supplies or to perform the service in question on time; or (ii) if the contractor fails to perform any of the other provisions of the contract, or so fails to make progress as to endanger performance of the contract, after having received at least ten days' notice from the contracting officer to correct or "cure" such failure. Notice in advance of termination need not be given, however, where "extensive repair or readjustment is necessary in order to produce a fully operable product."²⁴ In other words, a "contractor is entitled to a reasonable period in which to cure a nonconformity provided that the supplies shipped are in substantial conformity with * * * [the] specifications" in the first place.²⁵

²³ See *J. D. Hedlin Construction Co. v. United States*, 187 Ct. Cl. 45, 57 (1969) ("* * * The Board, we think, failed to recognize that a default-termination is a drastic sanction (see *Schlesinger v. United States*, 182 Ct. Cl. 571, 584, 390 F.2d 702, 709 (1968)) which should be imposed (or sustained) only for good grounds and on solid evidence."). (Italics supplied.)

²⁴ See *Radiation Technology, Inc. v. United States*, 177 Ct. Cl. 227, 232 (1966) ("* * * [T]he contractor is entitled to a reasonable period in which to cure a nonconformity provided that the supplies shipped are in substantial conformity with contract specifications.")

²⁵ *Id.*

The contracting officer did not indicate whether his decision to terminate was predicated on subparagraph (i) or (ii), but it is clear from the record that the termination was based on appellant's alleged failure to comply with the warranty provisions, which is covered by (ii). In that case the appellant should have been given an opportunity to remedy the deficiencies as contemplated under the contract, unless it can be said that the microscope did not conform substantially to the specifications.

It has not been shown that the Government fulfilled the "cure notice" requirement. Thorough examination of the record does not reveal any document that can even be remotely characterized as constituting such notice. Whatever complaints the Government may have made prior to acceptance, relating to its difficulties with the microscope, including threats to terminate, were vitiated by the act of acceptance.

The Government has not alleged that there was such substantial non-compliance with the specifications as to have obviated the need to give the appellant notice to cure. Having accepted and used the microscope, the Government is hard-put to prove that it did not conform because of poor manufacturing or workmanship. There is evidence in the record that acceptable publishable pictures could be produced by the microscope.²⁶ Mr. Massie testified that there were periods when he

²⁶ Tr. 292, 345, 352-53, 426, 469-70.

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regarded the operation of the instrument as satisfactory.²⁷ He also admitted that he could have damaged the microscope on occasion by mishandling.²⁸

The Government has not, in short, established that its problems were due to deviation from the specifications or to defects in the design, workmanship, and material of the instrument rather than to operator misuse. Put another way, there has been no showing by a preponderance of the evidence that defective manufacturing or workmanship was the most probable cause of the malfunctions and deficiencies.

Given the long, clouded history of this contract, the nature of the inspection or demonstration of performance prior to acceptance should have been a model of thoroughness. The finality of acceptance can be overcome only upon proof of the reasonableness of inspection. An article does not become latently defective simply because it fails to function. It must be shown that the failure was caused by a defect which would not ordinarily be disclosed by a careful examination.²⁹

²⁷ Tr. 372.

²⁸ Tr. 45, 46, 69, 145. Mr. Irwin Bluestein, appellant's general manager, testified that an "operator can unintentionally, by a mismanagement of the controls, damage the instrument. * * *" (Tr. 556.)

²⁹ Compare *Gale Machine & Tool Co., ASBCA No. 13954* (September 9, 1969), 69-2 BCA par. 7880, at 36,656, in which acceptance was held not to preclude recovery under a warranty clause for obviously defective pins of which the Government was knowledgeable before acceptance where the pins were of such a "material and character whereby they would not be affected" by "abusive handling * * *, storage or use." We are unable to find here

In this case, the record would not support a finding that the inspection was reasonable. Neither, in our opinion, has the Government established that acceptance was induced by such gross mistakes as amount to fraud.

In our view the appellant has demonstrated substantial compliance with its obligation to service the microscope under the Guarantee of Equipment clause. Repairs and replacement of parts were made within a reasonable time.³⁰ There is evidence that the appellant rendered extra service going beyond that which was required by the clause.³¹

For all these reasons, on the record before us we are unable to find that degree of noncompliance by the appellant with the specifications that would excuse the Government from notifying the appellant at least ten days prior to termination. We, therefore, hold that the Government was required to give the appellant a reasonable opportunity to cure or correct any deficiencies before terminating the contract for default.³² Its failure to do so ren-

on the record before us that the microscope and its components that malfunctioned were of such material and character that they would not be affected by abusive handling or use (Tr. 434-5, 485, 486-92, 556, 584, 589-91, 612, 644, 649; Appellant's Exhibits G, I, J and L).

³⁰ Tr. 310.

³¹ Tr. 117, 118, 309, 383; appellant's letter, dated January 18, 1972 (Tab A4).

³² *Bailey Specialized Buildings, Inc. v. United States*, 186 Ct. Cl. 71, 85-6 (1968). As the Court pointed out, whether ten days' notice would have been sufficient time to correct the defects is "hindsight speculation. * * * It may be that by accelerating the work, plain-

dered the termination for default wrongful.³³

Under subparagraph (e) of the Default clause, in case of an improper termination for default, the rights and obligations of the parties are to be treated as if the termination had been issued for the convenience of the Government, provided that the contract contains a termination for convenience clause.³⁴ This contract contains such

tiff could have cured the defects in ten days. In any event, it was entitled to the opportunity to do so. * * *

³³ *Id.*; *Roberts International Corporation*, ASBCA No. 10954 (June 13, 1968), 68-2 BCA par. 7074.

³⁴ "(e) If, after notice of termination of this contract under the provisions of this clause, it is determined for any reason that the Contractor was not in default under the provisions of this clause, or that the default was excusable under the provisions of this clause, the rights and obligations of the parties shall, if the contract contains a clause providing for termination for convenience of the Government, be the same as if the notice of termination had been issued pursuant to such clause. If, after notice of termination of this contract under the provisions of this clause, it is determined for any reason that the Contractor was not in default under the provisions of this clause, and if this contract does not contain a clause providing for termination for convenience of the Government, the contract shall be equitably adjusted to compensate for such termination and the contract modified accordingly; failure to agree to any such adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled 'Disputes.'" Clause 11. Standard Form 32. note 4, *supra*.

a clause.³⁵ Accordingly, the termination for default is treated as a termination for convenience of the Government.³⁶

The appeal is sustained and remanded to the contracting officer for whatever relief, if any, to which the appellant may be entitled under the Termination for the Convenience of the Government clause of the contract.

CONCLUSION

The appeal is sustained and remanded to the contracting officer.

SHERMAN P. KIMBALL, *Member*.

WE CONCUR:

WILLIAM F. MCGRAW, *Chairman*.

SPENCER NISSEN, *Member*.

³⁵ "TERMINATION FOR THE CONVENIENCE OF THE GOVERNMENT:

"The clause set forth in Sub-part 1-8.701 of the Federal Procurement Regulations is incorporated into this solicitation for offers and the resulting contract by reference with the same force and effect as though herein set forth in full. Any determination of costs under paragraph (c) or (e) of the clause set forth in Subpart 1-8.701 shall be governed by the principles for consideration of costs set forth in Sub-part 1-15.2 of the Federal Procurement Regulations (41 CFR 1-15.2), as in effect on the date of this contract." (p. 9.)

³⁶ Note 33 *supra*.

CASEY RANCHES**14 IBLA 48**Decided *December 4, 1973*

Appeal from a decision by Administrative Law Judge John R. Rampton, Jr., on February 20, 1973, dismissing an appeal from a notice by the District Manager of the Bureau of Land Management, Dillon, Montana, Grazing District, of loss of base property qualifications for grazing privileges.

Affirmed as modified.

Administrative Procedure: Licensing—Grazing Permits and Licenses: Generally—Rules of Practice: Generally

Under the Administrative Procedure Act, if a licensee has made a timely and sufficient application for a renewal of a license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency. This includes applications for grazing licenses and permits under the Taylor Grazing Act.

Administrative Procedure: Licensing—Grazing Permits and Licenses: Advisory Boards—Grazing Permits and Licenses: Appeals—Rules of Practice: Appeals: Failure to Appeal

A proposed decision of a District Manager which includes a Notice of Advisory Board Adverse Recommendation becomes the final decision of the Department of the Interior on a grazing license application if no appeal is taken in the time permitted by Departmental regulations.

Administrative Practice—Administrative Procedure: Hearings—Rules of Practice: Evidence

Under the Administrative Procedure Act, hearsay evidence is admissible at a hearing if it is relevant, material and not unduly repetitious, but it has little or no weight where the circumstances do not establish its reliability.

Administrative Procedure: Licensing—Grazing Permits and Licenses: Generally

In accordance with regulation 43 CFR 4115.2-1(e) (9) (i), where the evidence establishes that no application for a grazing license was filed for two consecutive years, the base property qualifications for grazing privileges in an allotment are properly found to be lost.

APPEARANCES: Ralph M. Tucker, Esq., Reno, Nevada, for appellant, Gary V. Fisher, Esq., Office of the Solicitor, Billings, Montana, Department of the Interior for the United States.

OPINION BY
**MRS. THOMPSON INTERIOR
BOARD OF LAND APPEALS**

Casey Ranches (hereinafter referred to as "Appellant") appeals from a decision of Administrative Law Judge John R. Rampton, Jr., affirming a notice of cancellation of its grazing license on the Cross Ranch grazing allotment and loss of its base property qualifications for failure to file an application for that allotment for two consecutive years as required by 43 CFR 4115.2-1(e) (9) (i).

Appellant had a grazing license for the Cross Ranch allotment in 1968. In response to its timely application to renew these privileges for

1969, on December 6, 1968, a "Notice of Advisory Board Adverse Recommendation" was sent to appellant by certified mail requesting its presence at an Advisory Board hearing on January 14, 1969. This notice included the "District Manager's Proposed Decision" which recommended approval of some of the grazing privileges in question, but withheld approval of the application until the applicant's pending trespass cases were settled and certain maintenance work completed. The notice also stated:

In the absence of a protest within the time allowed, the above recommendation shall constitute the District Manager's decision on your application. Should this notice become the District Manager's decision and if you wish to appeal such decision for the purpose of a hearing before an Examiner, in accordance with 43 CFR 1853, you are allowed thirty (30) days from receipt of this notice within which to file such appeal with the District Manager, Bureau of Land Management.

Appellant neither appeared at the Advisory Board meeting as requested nor protested the decision as permitted. Nor did it appeal. Appellant did not file an application for a grazing license for either 1970 or 1971.

After issuing a notice to show cause why appellant's grazing privileges should not be canceled, on February 25, 1971, the District Manager for the Bureau of Land Management, Dillon, Montana, issued a notice to Casey Ranches informing it that its base property qualifications on the Cross Ranch allotment were lost because it failed to file an application for a grazing

license containing the base property qualification for two consecutive years as required by 43 CFR 4115.2-1(e) (9) (i).¹

That notice was appealed to the Administrative Law Judge who found that appellant had not filed an application containing the required information for two consecutive years and "that the actions of the District Manager [in issuing the notice of cancellation of the base property qualifications] were in accordance with the regulation." This appeal is from that decision.

Appellant contends that the "Notice of Advisory Board Recommendation" was not a final decision on its 1969 grazing permit application and as a result its 1968 license has never expired. Therefore, appellant argues it had an outstanding term permit, and was not required to comply with 43 CFR 4115.2-1(e) (9) (i).

Appellant cites the following provision of the Administrative Procedure Act, 80 Stat. 388, 5 U.S.C. § 558(c) (1970), in support of its position:

When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an ac-

¹ That regulation provides:

"(9) Base property qualifications, in whole or in part, will be lost upon the failure for any two consecutive years:

"(i) To include in an application for a license or permit or renewal thereof, the entire base property qualifications for active, nonuse, or combination of active and nonuse, except where the base property qualifications are included in an outstanding current term permit, or where the allowable use has been reduced under §§ 4111.4-3(a)(3) and (c), and 9239.3-2(e) of this chapter."

tivity of a continuing nature does not expire until the application has been finally determined by the agency.

A grazing permit or license under the Taylor Grazing Act, 43 U.S.C. § 315(h) (1970), is a license within the meaning of the Administrative Procedure Act. *Frank Halls*, 62 I.D. 344, 346-47 (1955). If the conditions of the quoted provision have been met, the 1968 license would still be in effect. *Cf. Pan-Atlantic Steamship Corp. v. Atlantic Coast Line R. Co.*, 353 U.S. 436, 439 (1957). See this Department's regulations in this respect. 43 CFR 4.470(b), 4.477. As stated, however, in the December 6, 1968, notice to appellant, that notice was to become final if no protest or appeal was made in the time provided. Since appellant failed to comply with the decision and failed to protest or appeal timely, the proposed decision of the District Manager automatically became the final decision of this Department immune from subsequent appeal. 43 CFR 4.470(b); *Beryl Shurtz*, 4 IBLA 66, 70-71 (1971); *Richard McKay*, 2 IBLA, 1, 6 (1971); *Malvin Pedrolis*, 75 I.D. 63, 67 (1968). The Administrative Procedure Act did not operate to prevent the 1968 license from expiring. Therefore, appellant did not have a valid current term permit, and was required to comply with 43 CFR 4115.2-1(e)(9)(i), or suffer the loss of its base property qualifications pursuant thereto.

The remainder of appellant's contentions purportedly explain its noncompliance with the regulation.

We do not find any of them sufficient to prevent the cancellation of its base property qualifications.

Appellant contends that Glade Stringer tendered, on its behalf, an application for the Cross Ranch allotment, but BLM personnel improperly refused to accept the application. Despite efforts to locate him, Stringer did not testify at the hearing. In an affidavit, offered into evidence but rejected by the Judge in his Order of October 24, 1972, Stringer stated that he attempted to file an application for a grazing permit for the Cross Ranch allotment in 1970, and that he was advised by BLM employees that Casey Ranches was the proper person to make application.

The refusal by the Administrative Law Judge to admit the affidavit into evidence was incorrect. To that extent only, the Judge's decision is modified. However, as will be shown, there is no reversible error. The Administrative Procedure Act (APA) says in part, "Any oral or documentary evidence may be received, but the Agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial or unduly repetitious evidence." 5 U.S.C. § 556(d) (1970). Hearsay evidence, under this provision, is admissible if it is relevant, material and not unduly repetitious. *Richardson v. Perales*, 402 U.S. 389, 409 (1971); *United States v. Stevens*, 76 I.D. 56, 59-60 (1969); see cases collected at 6 ALR Fed. 97-98 (1971). Stringer's affidavit is relevant and material to the issue of

whether the application required by 43 CFR 4115.2-1(e)(9)(i) was filed. It is not unduly repetitious.

Under the APA the Agency has all the powers in reviewing an appeal from a decision of an Administrative Law Judge as it would have in making an original decision, including making findings of fact, except as it may limit the issues on notice or by rule. 5 U.S.C. § 557(b) (1970); *United States v. Middle-swart*, 67 I.D. 232, 234 (1960); *United States v. Little*, A-30842 (Feb. 21, 1968). This Board, acting for the Agency in reviewing the initial decision of the Administrative Law Judge, will consider the affidavit in making our findings of fact. *United States v. Nelson*, 8 IBLA 294, 296 (1972).

Sam Short, an employee of the Dillon Office of the BLM testified that Stringer never tendered or filed an application for the Cross Ranch allotment. Transcript (Tr.) at 26, 27, 29, 33. This testimony was made under oath and subject to cross-examination. Appellant's contrary position is somewhat supported by Stringer's hearsay affidavit, although, in any event, the language in the affidavit is subject to a more limited interpretation than appellant would give it. Stringer was stated to be in default on his contractual obligations with appellant and he actively avoided being served with a subpoena to testify at the hearing. The APA says a decision must be supported "by reliable, probative and substantial evidence." 5 U.S.C. § 556(d) (1970). To aid the

fact-finder in determining whether evidence is reliable and probative, the APA provides that "[a] party is entitled * * * to conduct such cross-examination as may be required for a full and true disclosure of the facts." *Id.* Cross-examination, among its other functions, tests the veracity and memory of a witness. Stringer did not testify at the hearing, so his veracity and reliability were not tested or established by cross-examination. Furthermore, the confusion in his statement mentioned above could not be clarified through cross-examination. Under the circumstances, Stringer's reliability and veracity cannot be assumed, and the affidavit has little or no weight. *Richardson v. Perales*, *supra*; *Consolidated Edison v. NLRB*, 305 U.S. 197 (1938). The reliable and probative evidence on the issue of tender of the application by Stringer is Short's testimony that no application was tendered. We conclude that the Administrative Law Judge's finding on this issue was correct despite the improper exclusion of the affidavit.

Appellant alternatively attributes its failure to file an application to the existence of illegal conditions imposed in the December 6, 1968, "Notice of Advisory Board Adverse Recommendation," as prerequisites to the issuance of its 1969 license and the refusal of a BLM employee to accept any future application until these conditions were met. (Tr. 90, 91.) Review of the conditions imposed by the December 8, 1968, notice is precluded by appellant's

December 6, 1973

failure to protest that notice within the time permitted by the regulation. *Beryl Shurtz, supra; Malvin Pedrolis, supra.* We also find that while the record shows that John Casey, appellant's President, may have been told that no future application would be "honored," that is, approved, until the conditions were met, such advice did not prevent him from filing an application. An application is filed if the document is delivered to and received in the proper office of BLM. 43 CFR 1821.2-2(f). There is no evidence that such a document was ever delivered to the BLM office for Casey Ranches during the years in question. Any oral advice by an employee is merely tentative, and cannot excuse appellant's failure to take the simple steps necessary to prevent the operation of regulation 43 CFR 4115.2-1(e)(9)(i). In addition, the record shows that appellant relied on Glade Stringer to make the necessary BLM applications and that Stringer, not the BLM, occasioned the failure to file. (Tr. 104.)

The decision that appellant's base property qualifications have been lost as to the Cross Ranch allotment was proper since the evidence indicates that appellant did not file an application for a grazing license for two consecutive years.

We have also considered appellant's other contentions and find they are without merit.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of

the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

JOAN B. THOMPSON, *Member.*

WE CONCUR:

DOUGLAS E. HENRIQUES, *Member.*

JOSEPH W. GOSS, *Member.*

GALLOWAY LAND COMPANY

2 IBMA 348

Decided December 6, 1973

Appeal by Galloway Land Company from an initial decision of Richard C. Steffey, Administrative Law Judge (Judge) (Docket Nos. MORG 72-50-P, 72-56-P, 72-83-P, and 72-114-P) ordering appellant to pay civil penalties totaling \$10,127 assessed pursuant to the Federal Coal Mine Health and Safety Act of 1969¹ (Act) for violations disclosed during inspections of appellant's Dawson and Pioneer Mines in January, April, June, July and August of 1971.

Affirmed.

Federal Coal Mine Health and Safety Act of 1969: Appeals: Generally

The Board will not disturb the findings and conclusions of an Administrative Law Judge in the absence of a showing that the evidence compels a different result.

APPEARANCES: H. G. Underwood, Esq., for appellant, Galloway Land Company; Robert W. Long, Associate

¹ P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

Solicitor, J. Philip Smith, Assistant Solicitor, and W. Hugh O'Riordan, Trial Attorney, for appellee, Mining Enforcement and Safety Administration (MESA).

**OPINION BY MR. ROGERS
INTERIOR BOARD OF MINE
OPERATIONS APPEALS**

Background

Mining Enforcement and Safety Administration (MESA) filed four petitions for the assessment of civil penalties in accordance with section 100.4(i) of Title 30, Code of Federal Regulations and pursuant to section 109 of the Act. The petitions were filed on December 6 and 14, 1971, March 29 and May 24, 1972, respectively. They were consolidated for a hearing which was held on February 21 and 22, 1973, in Morgantown, West Virginia. On June 21, 1973, the Judge issued his decision assessing penalties in the four dockets as follows:

Docket No. MORG 72-50-P,	
[5 violations]-----	\$411
Docket No. MORG 72-56-P,	
[3 violations]-----	2, 575
Docket No. MORG 72-83-P,	
[67 violations]-----	6, 911
Docket No. MORG 72-114-P,	
[8 violations]-----	230
Total assessments-----	\$10, 127

Several petitions for assessment were dismissed by the Judge to the extent they sought assessment for certain violations concerning which the appellant was not given proper notice prior to the hearing.

The appellant is a subsidiary of Standard Industry which in turn is

owned by Michaels Industries. Approximately five months before the hearing, in September 1972, appellant terminated its coal-mining operations. It subsequently began to liquidate its assets and became involved in several court actions brought by its creditors. As of July 30, 1973, when it filed its appeal brief herein, appellant had not resumed its coal-mining operations.

Contentions on Appeal

Appellant asserts that since it is no longer engaged in coal-mining operations, "the Act has apparently served its purpose," and that the assessment of penalties would endanger the recovery of creditors and would violate the clear mandate of Congress with respect to the appropriateness of such penalties to the size of the operator's business.

Appellant also contends that:

(a) The evidence did not support conclusions of MESA witnesses that certain violations occurred because of the operator's negligence;

(b) Repeated violations resulted solely from the operator's inability to obtain the equipment necessary for compliance;

(c) The majority of the violations were "housekeeping errors" in which neither gravity nor appellant's good faith were properly considered.

Appellant also suggests that the hearing in the present proceedings was tainted because the Court, in *National Independent Coal Operators' Association et al. v. Rogers C. B. Morton*, 357 F. Supp.

509 (D.D.C. 1973) (hereinafter NICOA), found informal assessment procedures improper.

MESA requests that the Judge's decision be affirmed because:

(a) The appellant went out of business for reasons other than the assessment of penalties;

(b) The appellant is able to pay the penalties;

(c) The decision in NICOA, *supra*, does not apply.

Issues

(1) Whether appellant was compelled to terminate its coal-mining operations as a result of the penalties assessed in this proceeding;

(2) Whether the penalties assessed were inappropriate to the size of appellant's business; and

(3) Whether the hearing was "tainted" as a result of the NICOA decision.

Discussion

I

Appellant's last full year of coal-mining operations was 1971. In that year it produced 624,725 tons of coal which it sold for \$4,526,282.18 earning a net profit of \$684,133.44.² In the latter part of 1971, appellant began losing money. Its business manager attributed this to "high organized labor and rigid mining laws" (Tr. 49). In June 1972, it closed its Dawson Mine because the reserves had been exhausted and any

remaining coal could not be mined economically in compliance with the Act (Tr. 46, 64). The coal reserves in the Pioneer Mine were leased to appellant by Consolidation Coal Company. By the terms of the lease, appellant could mine only half the reserves for its own sale. The other half was to be mined for and turned over to Consolidation for its sale. The Pioneer mine was shut down in September 1972, because it was an unprofitable venture (Tr. 63-64). Appellant's business manager could not say that either the purchase of new equipment or the possibility of assessment of penalties forced Galloway out of business (Tr. 50-51).

The appellant was confronted with several potential liabilities (in addition to the civil penalties of this proceeding) as follows:

(1) An amount of \$49,275.75 was held in reserve with respect to a dispute between appellant and the United Mine Workers (Tr. 57);

(2) 17 suits by suppliers of goods and services, aggregating \$50,000 were pending against appellant (Tr. 57-58);

(3) As of December 31, 1972, appellant had debts of \$1,945,709.14, attributable to the long-term notes and loans of its corporate parents.³

On the basis of these facts the Judge concluded that the possible assessment of penalties was not the cause of appellant's decision to discontinue coal mining. He rejected the contention that payment of penalties should be avoided where their

² Appellant's Exhibit B (Profit and Loss Statement).

³ Appellant's Exhibit A (Balance Sheet).

collection might endanger the recovery of creditors. Using appellant's balance sheet and profit and loss statement, he calculated that even if appellant were ordered to pay all the amounts in dispute it would still be left with approximately \$741,319.84. He also rejected the argument that appellant's inter-company obligations demonstrated that it could not pay civil penalties.

Appellant does not specifically take issue with any of these findings or conclusions, nor does it point to evidence on which contrary conclusions might be based. The brief simply suggests that because of the termination of coal-mining operations the assessments are either too high or invalid. As to invalidity of the penalty this suggestion is without merit. As this Board stated in *Valley Camp Coal Company*, 1 IBMA 243, 248, 79 I.D. 730, 735, CCH Employment Safety and Health Guide par. 15,390 at p. 20,571 (1972), section 109 of the Act⁴ requires the assessment of a penalty whenever a violation exists

in a coal mine (*Italics original*). There is no criterion in section 109 which cancels this mandate in the event an operator terminates its coal-mining business for reasons not related to the assessment of penalties. Moreover, since the record is devoid of specific evidence regarding the effect of penalties on the operator's ability to continue in business there is a legal presumption that the penalties here assessed would not affect appellant's ability to continue in business if it chose to do so. *Buffalo Mining Company*, 2 IBMA 226, 252, 80 I.D. 630, 640, CCH Employment Safety and Health Guide par. 16,618, at p. 21,428 (1973).

II

In discussing the second issue we are concerned with the appropriateness of the penalties to the size of the operator's business. Since section 109(a)(1) of the Act does not state what period of time should be used in determining the size of the operator's business, the Judge used 1971, the year when the notices and orders were written. In 1971 appellant produced 624,725 tons of coal. It utilized continuous mining machines and conveyor belts. Based on these factors, the Judge concluded that appellant was a medium-sized company which should be penalized accordingly.

The appellant has not argued that a different period of time should have been used for evaluating the appropriateness of the penalties to the size of business. It

⁴ Sec. 109(a)(1) reads: "The operator of a coal mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, except the provisions of title 4, shall be assessed a civil penalty by the Secretary under paragraph (3) of this subsection which penalty shall not be more than \$10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense. In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation."

has merely suggested that the amount of the penalties should be reduced.

Appellant's general arguments, that conclusions of negligence are not supported by the evidence, that repetitious violations resulted solely from the operator's inability to obtain equipment, and that gravity and good faith were not properly considered, are inconsistent with the record in this case.

The Judge's decision contains detailed findings and conclusions with regard to each of more than 80 violations for which a penalty was assessed. The amounts assessed range from \$1 to \$2,500. Appellant has not taken issue with any of the assessments on an individual basis. Its brief contains no references to the transcript and no allegations that the Judge erred or abused his discretion in specific instances. Moreover, appellant's brief falls short of the requirements of 43 CFR 4.601(a) which states in relevant part:

* * * Appellant's brief shall set forth in detail the objections to the initial decision, the reasons for such objections and the relief requested. Any error contained in the initial decision that is not objected to may be deemed by the Board to have been waived. Where any objection is based upon evidence of record, such objection need not be considered by the Board if specific record citations to the pertinent evidence are not contained in appellant's brief.

III

Finally, the appellant's reliance on the decision in *NICOA, supra*, is misplaced. This Board found in *Western Slope Carbon, Inc., 2 IBMA 161, 80 I.D. 707, CCH Employment Safety and Health Guide par. 16,300 (1973)* that the *NICOA* decision does not relate in any way to the hearing procedure under 43 CFR Part 4. The hearing was *de novo*.

Galloway Land Company has not demonstrated any reason why the findings and conclusions of the Judge should not be affirmed. The record supports his decision and assessments. The arguments advanced by appellant were fully and fairly considered by the Judge. No new arguments were advanced on appeal to this Board.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that: the decision of the Administrative Law Judge IS AFFIRMED; and Galloway Land Company pay \$10,127 on or before 30 days from the date of this decision.

C. E. ROGERS, JR., *Chairman.*

I CONCUR:

DAVID DOANE, *Member.*

**ADMINISTRATIVE APPEAL OF
CONTINENTAL OIL COMPANY****2 IBIA 116**Decided *December 11, 1973*

Appeal from an administrative decision involving oil and gas lease No. 14-20-205-4266.

Affirmed.

Indian Lands: Leases and Permits: Generally—Indian Lands: Leases and Permits: Oil and Gas

Where an oil and gas lease provides for a term of years and as much longer thereafter as oil and gas is produced in paying quantities, upon failure of production during the primary period the lease terminates by its own terms.

Indian Lands: Leases and Permits: Generally—Indian Lands: Leases and Permits: Oil and Gas

Neither the payment nor the receipt of advance rentals by departmental officials on a lease which has terminated can continue or reinstate the lease.

APPEARANCES: Carl Young, III, Esq., for appellant, Helmerich and Payne, Inc.

OPINION BY MR. WILSON**INTERIOR BOARD OF
INDIAN APPEALS**

This matter comes before this Board on an appeal from an Area Director's refusal to approve an oil and gas communitization agreement of Helmerich and Payne, Inc., hereinafter referred to as appellant.

The agreement in question involves a portion of the trust allotment of Broken Rib, deceased Cheyenne-Arapaho No. 2316, described as NW $\frac{1}{4}$ SW $\frac{1}{4}$ section 8, T. 18 N., R. 13 W, I.M. An oil and gas lease, No. 14-20-205-4266, was approved thereon by the Acting Area Director, Anadarko Area Office, Bureau of Indian Affairs, Anadarko, Oklahoma, on December 21, 1967, for a period of five years and "*as much longer thereafter as oil and gas is produced in paying quantities from said lands.*" (*Italic supplied.*)

The agreement, subject of the appeal herein, was submitted to the Area Director, Anadarko Area Office, by the appellant on March 22, 1973. Thereafter, by letter dated April 5, 1973, the Area Director advised the appellant that its agreement could not be approved. The Director's refusal is couched in the following language:

We have carefully considered Mr. Young's request that we approve your communitization agreement and reject the bid tendered at the March 21 land sale, and have determined that such action cannot be justified under the provisions of the lease and the applicable regulations of the Secretary of the Interior, nor would it be in the best interest of the Indian owner. The proposed communitization now comes too late. *The lease has expired and the leased premises are not included within a producing unit by reason of an approved communitization agreement.* (*Italics supplied.*)

The appellant on April 16, 1973, filed an appeal from the Area Director's refusal. In support of the

December 11, 1973

appeal the appellant urges as error the following questions of fact and law:

1. That the decision of the Area Director as it applied to the Appellant is in violation of and in contradiction to the Lease Contract #14-20-205-4266 and more particularly described as follows:

(a) The proposed communization agreement was approved by the United States Geological Survey subject to certain changes which were incorporated in said agreement; and

(b) The Indian mineral owner, Danny Elroy Wall Blackhorse, executed the communization agreement prior to the termination date of the lease agreement, thereby permitting him to participate in the producing well within the unit; and

(c) The advance royalty payment, received by the Bureau of Indian Affairs, and *accepted* by the Bureau of Indian Affairs on December 1, 1972; and

(d) Paragraph 11 of lease contract #14-20-205-4266 (Form 5-154H-Oil and Gas Mining lease-Allotted Indian Lands) does not state that approval of an "agreement for cooperative or unit development of the field or area" must be *formally* secured prior to a lease termination date. The communization agreement in question was approved in substance by the United States Geological Survey and an Indian Mineral Owner prior to the termination date of the lease. Paragraph 11 states that the approval by the Secretary of the Interior must be during the period of supervision, which period is still in progress.

(2) That the decision of the Area Director is not supported by substantial evidence and that the refusal to formally approve the Communization Agreement is arbitrary and unreasonable in that the Indian owner has been denied the right to share in a producing well, which well may in view of its economic capability be the only well drilled on the quarter-section.

The only question for the determination of this Board is:

Was the Area Director, under the circumstances as set forth above in appellant's contentions, in error in refusing to approve the communization agreement?

We think not. It is indisputable from the record that there was no production on the leased premises nor was the leased premises included within a producing unit under a communization agreement *approved by the Area Director prior to the expiration of the lease.* (Italics supplied.) As a consequence, the lease expired by its own limitation on December 21, 1972. In view thereof, we fail to see how the events set forth in appellant's contentions could possibly justify the projection of the lease beyond its primary term. The Department has long held that failure to put leased premises under production in paying quantities during the primary period results in the termination of the lease by its own terms. *Solicitor's Opinion*, 58 I.D. 13 (1942); *The Superior Oil Company and The British-American Oil Producing Company*, 64 I.D. 49 (1957). The courts have likewise held accordingly. *United States v. Brown et al.*, 15 F.2d 565 (D.C. Okla. 1926); *Woodruff v. Brady*, 72 P. 2d 709 (1937); *Dyggus et al. v. Rogers et al.*, 181 P. 2d 253 (1947).

The United States Geological Survey contrary to appellant's con-

tention did not approve the communitization agreement submitted by appellant on March 16, 1973. The record indicates the United States Geological Survey returned the agreement to appellant without action.

Execution of the agreement by the Indian mineral owner, Danny Elroy Wall Blackhorse, prior to the termination of the primary term of the lease, in itself could not legally bind or commit the leased acreage into the participating unit. Only the approval by the Area Director during the primary term of the lease could officially commit the acreage into the producing unit and thus continue the lease in full force and effect.

The record indicates that money was received by the Bureau of Indian Affairs as advance payment of delay rentals. Receipt, however, does not constitute acceptance. In any event, acceptance would not continue or reinstate the lease in question which had terminated by its own limitation.

We cannot agree with the appellant's argument regarding the term "supervision" as used in paragraph 11 of lease contract #14-20-205-4266 (Form 5-154h). The appellant in effect urges that so long as the premises in question remained in trust and under the jurisdiction of the Secretary of the Interior the agreement could be approved after the lease termina-

tion date. As we have stated elsewhere herein only the approval of the agreement *during the primary term of the lease* could continue the lease beyond the termination date thereof. (Italics supplied.) To approve the agreement after the termination date of the lease would be improper and without authority. *United States v. Brown, supra*; cf. *Haby v. Stanolind Oil and Gas Company*, 228 F.2d 298. (5th Cir. 1955).

Moreover, we disagree with appellant's final contention that the decision of the Area Director was not supported by substantial evidence and that his refusal was arbitrary and unreasonable. We feel the Area Director's decision was proper and correct under the circumstances, *i.e.*, the lease had expired by its own terms or limitation and no action on his part under the circumstances could possibly revive the terminated or expired lease.

In view of the reasons hereinabove set forth and discussed, the Area Director's refusal of April 5, 1973, to approve the communitization agreement IS AFFIRMED and the appellant's appeal IS HEREBY DISMISSED.

This decision is final for the Department.

ALEXANDER H. WILSON, *Member*.

I CONCUR:

MITCHELL J. SABAGH, *Member*.

December 11, 1973

**ESTATE OF GEORGE MORTIMER
CUMMINGS (DECEASED CHEY-
ENNE RIVER ALLOTTEE 3484)****2 IBIA 112**Decided *December 11, 1973*

Petition to reopen.

Granted.

**375.1 Indian Probate: Reopening:
Waiver of Time Limitation**

To avoid perpetuating a manifest injustice, a petition to reopen filed more than three years after the final determination of the heirs will be granted where compelling proof is shown that the delay was not occasioned by the lack of diligence on the part of the petitioning party.

APPEARANCES: Mable C. Marrs and Joan M. Hamilton, pro se.

*OPINION BY MR. WILSON
INTERIOR BOARD OF
INDIAN APPEALS*

Pursuant to the Board's Preliminary Order on Petition for Reopening, dated January 31, 1972, Docket No. 72-6, a hearing in the Estate of George Mortimer Cummings was duly held and completed at Portland, Oregon, on December 12, 1972.

From the evidence adduced at said hearing the petitioners, Mable C. Marrs and Joan M. Hamilton, have clearly established, and we find (1) that they were not dilatory in asserting their rights in and to the estate herein (2) that they are related to the decedent in such a degree so as to entitle them to share in

his estate as heirs under the South Dakota laws of Descent and Distribution (3) that the Order Determining Heirs entered in this estate on July 17, 1967, resulted from a mistake of such a nature so as to warrant reopening and correction, to avoid perpetuation of a manifest injustice (4) that none of the heirs as originally determined has entered any objection to the reopening of the estate herein, and (5) that there are no existing intervening rights which would jeopardize the title to the lands involved.

In view of the foregoing circumstances, the estate herein should be reopened and the Order Determining Heirs, dated July 17, 1967, modified and corrected to (1) include the petitioners as heirs therein and (2) to reapportion the shares of the heirs in the estate.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the estate of George Mortimer Cummings, Cheyenne River Allottee No. 3484, IS HEREBY REOPENED and the Order Determining Heirs, dated July 17, 1967, IS HEREBY AMENDED, CORRECTED AND MODIFIED to redetermine the decedent's heirs and to reapportion their shares as follows, to wit:

Ronald Crain Cummings, Cheyenne
River nonenrolled, son, $\frac{1}{4}$
Shelly Marie Cummings, Cheyenne
River nonenrolled, daughter, $\frac{1}{4}$
Mable Carmen Marrs, Cheyenne

River nonenrolled, daughter, $\frac{1}{4}$ Joan Marie Hamilton, Cheyenne River nonenrolled, daughter, $\frac{1}{4}$
This decision is final for the Department.

Done at the city of Arlington, Virginia.

ALEXANDER H. WILSON, *Member*.

I CONCUR:

MITCHELL J. SABAGH, *Member*.

ARMCO STEEL CORPORATION

2 IBMA 359

Decided *December 12, 1973*

Armco Steel Corporation appealing an initial decision and order issued March 26, 1973, assessing \$1,300 for violations of the Federal Coal Mine Health and Safety Act of 1969 in Docket No. HOPE 72-153-P.

Affirmed in part and vacated in part.

Federal Coal Mine Health and Safety Act of 1969: Evidence: Sufficiency

Where a notice of violation of section 304(a) of the Act shows no indication of the depth or extent of an accumulation of combustible material, and MESA's sole witness, the inspector who issued the notice, has no present recollection of the condition, for which the notice was issued, the evidence is insufficient to constitute a prima facie case.

APPEARANCES: William C. Payne, Esq., and John H. Tinney, for appellant, Armco Steel Corporation.

OPINION BY MR. DOANE INTERIOR BOARD OF MINE OPERATIONS APPEALS

Armco Steel Corporation (Armco) appeals to the Board from an initial decision and order dated March 26, 1973, wherein penalties were assessed for various violations totaling \$1,300 pursuant to section 109(a) of the Federal Coal Mine Health and Safety Act of 1969.¹ The decision dealt with fourteen notices of violation of which only seven are challenged on appeal. A cross-appeal was filed by the Bureau of Mines, hereinafter, Mining Enforcement and Safety Administration (MESA), and dismissed on June 11, 1973.² IBMA 73-38.

Having reviewed the record and considered the brief of the appellant, Armco, we are of the opinion that, with the sole exception of Notice No. 1 JG, July 2, 1970, the allegations of error are insubstantial and wholly without merit. Apart from the excepted notice, Armco has shown no reason why the findings of fact and conclusions of law of the Administrative Law Judge should not be affirmed.

Notice No. 1 JG cited appellant for an alleged violation of section 304(a) of the Act which proscribes accumulations of loose coal, coal dust and other combustible mate-

¹ P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1969).

² Effective July 16, 1973, the MESA was substituted as the Appellant in this case. See 38 F.R. 18165 (1973). For the sake of convenience, we will refer to the enforcing authority throughout as MESA.

rials. The record reveals that MESA's evidentiary presentation consisted of the notice itself and the testimony of the issuing inspector, Mr. Jules Gautier. The notice was admitted without objection (Tr. 25) and reads as follows:

Accumulations of coal dust, oil and grease were present on the continuous miner, roof-bolting machine, and Nos. 14 and 15 shuttle cars in 12 southwest section. (Govt. Exh. No. 5.)

Inspector Gautier admitted that he had no present recollection of the cited condition but he stated that it was his unvarying practice to issue a section 304(a) notice where the amount of material observed was in excess of one and one-half inches. (Tr. 25, 26, 29, 30.)

Armco called C. J. Halstead as a witness in its behalf. He was superintendent of the Robin Hood Mine which was the site of the alleged violation and was present at the inspection. He opined that the amount of offending material to which the notice referred was not unreasonable. (Tr. 34.) He did not, however, testify as to the depth or extent of the amounts in dispute.

We have decided to vacate this notice because, in our view, MESA failed to present a prima facie case, that is to say, the evidence of record was insufficient to require the operator to adduce rebutting evidence and to support findings of fact and conclusions of law that a violation did occur. The text of the notice itself is devoid of any indication of the depth and extent of the mass of

combustible material, on the basis of which we could determine if there was an "accumulation" within the meaning of section 304(a) of the Act. The inspector's remarks with regard to his allegedly unvarying inspection practices do not compensate for the deficiencies of the notice. In the first place, his statements are entirely self-serving and do not really prove any precise condition. Second, if we were to hold that MESA's presentation did constitute a prima facie case, the operator would have to investigate the inspector's alleged practices. Such an inquiry would place an unfair burden upon the operator, would probably involve production of numerous records by MESA, and would drastically widen the scope of the hearing far beyond the relevant.

We emphasize that the Board is not holding that a notice of violation may never constitute a prima facie case. Indeed, we are of the view that a sufficiently specific notice of violation, with proper foundation, standing by itself, may constitute a prima facie case in some instances. In the case at hand, the subject notice was too general and conclusory and the additional evidence presented by MESA failed to remedy its deficiencies. Moreover, the evidence outlined above which Armco voluntarily presented did not compensate for the gaps in the Government's case that we feel are crucial.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision appealed from IS AFFIRMED except that Notice No. 1 JG, July 2, 1970, IS VACATED and the associated assessment in the amount of \$100 IS SET ASIDE.

IT IS FURTHER ORDERED that Armco Steel Corporation pay the penalties assessed in the total amount of \$1,200 on or before thirty days from the date of this decision.

DAVID DOANE, *Member.*

I CONCUR:

C. E. ROGERS, JR., *Chairman.*

UNITED STATES v.
MINERAL VENTURES, LTD.

14 IBLA 82

Decided *December 12, 1973*

Appeal from decision of Administrative Law Judge Dean F. Ratzman (Contest No. OR-09999-E) holding appellant's mining claims subject to section 4 of the Surface Resources Act of July 23, 1955.

Affirmed as modified.

Mining Claims: Surface Uses—Surface Resources Act: Generally

In a proceeding under section 5 of the Surface Resources Act of July 23, 1955, to determine whether a mining claim is

subject to the limitations and restrictions of section 4 of the Act, the issue is whether or not there is now disclosed within the boundaries of each claim valuable minerals of sufficient quantity, quality, and worth to constitute a discovery, and whether the discovery was made prior to the effective date of the Act.

Mining Claims: Discovery: Generally

To verify whether a discovery of a valuable mineral deposit has been made, a government mineral engineer need not explore or sample beyond those areas which have been exposed by the claimant; he is not required to do the discovery work for the claimant.

Mining Claims: Discovery: Generally—Mining Claims: Surface Uses—Surface Resources Act: Generally

Testimony by a government mineral engineer that he examined the mining claims and the workings thereon and sampled the areas recommended by the claimant but found no evidence of a valuable mineral deposit which would have in the past or present justified a person of ordinary prudence in the further expenditure of his time and means in an effort to develop a valuable mine, is sufficient to establish a prima facie case of absence of a discovery so as to subject a mining claim to the limitations imposed by section 4 of the Act of July 23, 1955.

Mining Claims: Discovery: Generally

Under the mining laws one discovery anywhere on a claim is sufficient to constitute a discovery as to the whole claim.

Mining Claims: Discovery—Surface Resources Act: Hearings

A hearing under section 5 of the Surface Resources Act of July 23, 1955, directed only to a portion of a claim is insufficient to establish an absence of a discovery as to the whole claim as the locator may still

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have a valuable mineral deposit on that portion of the claim not challenged by the Government.

Mining Claims: Surface Uses—Surface Resources Act: Verified Statement

Where a verified statement filed pursuant to the Surface Resources Act of July 23, 1955, fails to set forth, as required by section 5(a)(3) of the Act, all of the sections of public land which are embraced within each of the claimant's mining claims, the statement is defective as to an inadequately described claim and said claim is subject to the limitations and restrictions of the Act.

APPEARANCES: William B. Murray, Esq., Portland, Oregon, for appellant; Albert R. Wall, Esq., Office of the General Counsel, United States Department of Agriculture, for appellee.

OPINION BY MR. RITVO
INTERIOR BOARD OF LAND
APPEALS

Mineral Ventures, Ltd., has appealed from an adverse decision of an Administrative Law Judge dated February 8, 1973. The Judge declared appellant's placer gold mining claims subject to the limitations and restrictions of section 4 of the Surface Resources Act of July 23, 1955, *30 U.S.C. § 612 (1970)*.

At the request of the Forest Service, United States Department of Agriculture, a proceeding pursuant to section 5 of the above Act was initiated. The purpose of the proceeding was to determine the right of the United States to control and use the surface resources on three

placer mining claims so long as the claims remained unpatented.

A hearing was held in Portland, Oregon, on October 24, 1972, to determine whether a discovery of a valuable mineral deposit had been made within the limits of any of the claims. The three claims in issue are the Enterprise, Swamp, and Extension of Swamp, located in sec. 13, T. 41 S., R. 7 W., Willamette Meridian, Althouse Mining District, Josephine County, Oregon. A portion of the Enterprise claim extends approximately 1,000 feet across the Oregon border into California. All the proceedings preliminary to the hearing were directed solely to the Oregon portion of the Enterprise. The problems arising from this restriction are discussed below.

During the hearing the Government's sole witness, Clover F. Anderson, a Forest Service mining engineer, testified that he had taken samples from the subject claims and that the gold content in the samples was very low. (Tr. 23, 24.) He further testified that the cost of exploiting the gold from these claims would make a mining operation unprofitable. (Tr. 25, 49, 50.) In his view, a valuable mineral deposit had not been discovered on the claims prior to July 23, 1955, and a discovery did not presently exist, even given today's gold prices. (Tr. 26, 50.)

The mining claimant presented almost no probative evidence regarding a discovery on the Swamp or Extension of Swamp claims. It did actively assert that a discovery

presently existed, and did exist prior to July 23, 1955, on the Enterprise claim. Its witnesses testified that gold, in a sufficient quantity, was present on the claims justifying further expenditure of time and moneys for development of the properties with a reasonable prospect of success. (Tr. 92, 98, 116.)

The Administrative Law Judge reached the conclusion that no discovery of a valuable mineral deposit within the limits of any of the claims in issue had been demonstrated. Consequently, he declared the three claims subject to the restrictions and limitations contained in section 4 of the Act of July 23, 1955, *supra*.

On appeal, the appellant presses three primary arguments:

1. Mr. Anderson, sole witness for the Government, anchored his opinion as to lack of discovery upon the erroneous assumption that the Claimant must prove that the mine was profitable on July 23, 1955.

2. One discovery on a claim is sufficient. Thus evidence of lack of discovery on a portion of the claim is insufficient to establish a prima facie case as to that claim. The Enterprise is part in Oregon and part in California.

3. The Government alleged, but offered no evidence to prove, that the Office of Hearings and Appeals had jurisdiction to try this case under the Surface Resources Act, 30 U.S.C. § 613.

Appellant first argues that the Government's witness based his opinion regarding lack of a discovery on an erroneous profitability test: i.e., that the claimant must prove that the mine was, in fact, profitable. Appellant points out that proof of lack of a discovery

cannot be based solely upon a showing that a mine was or is not, in fact, operated profitably. He cites *Converse v. Udall*, 399 F.2d 616, 622 (9th Cir. 1968), *cert. den.*, 393 U.S. 1025 (1969), wherein the Court stated:

* * * But this does not mean that the locator must prove that he will in fact develop a profitable mine.

Having reviewed the complete record, we cannot agree with appellant's contention that Anderson relied exclusively on a past and present profitability test in determining whether a discovery existed. Anderson's references to profitability were simply comments respecting the potential economic viability of the claims. The witness' total evaluation of the quantity of gold on the claims and the cost of removing and processing the material indicated that a mining venture would not be profitable. He found no exposure of a mineral deposit on any of the claims which would have, in the past or present, justified a person of ordinary prudence in the further expenditure of his time and means in an effort to develop a valuable mine.

It was proper for Anderson to consider the economics of the situation when making his evaluation regarding discovery on the claims. In *Chrisman v. Miller*, 197 U.S. 313, 322 (1905), the Supreme Court stated that in order to satisfy the prudent man test of *Castle v. Womble*, 19 L.D. 455, 457 (1894):

"* * * The mere indication or presence of gold or silver is not sufficient to establish the existence of a lode. The mineral

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must exist in such quantities as to justify expenditure of money for the development of the mine and the extraction of the mineral." * * *

A similar test is presented in the lines immediately preceding appellant's quotation from *Converse*, *supra*, p. 622:

* * * But the marketability test does permit the fact finder, even in the case of a showing of gold, to consider, somewhat more extensively than heretofore, the economics of the situation. Perhaps we could phrase the test this way: When the claimed discovery is of a lode or vein bearing one or more of the metals listed in 30 U.S.C. § 23, the fact finder, in applying the prudent man test, may consider evidence as to the cost of extraction and transportation as bearing on whether a person of ordinary prudence would be justified in the further expenditure of his labor and means. But this does not mean that the locator must prove that he will in fact develop a profitable mine.

Given the above tests in *Chrisman* and *Converse*, *supra*, Anderson's analysis of profitability and other economic criteria was a correct basis for a determination of lack of discovery. The Judge properly relied on this testimony in his decision on the issue of discovery. In any event, the crucial point is not what the witness' concept of "discovery" was, but whether the Judge understood and employed, the proper standard. It is clear that he did not require appellant to prove profitability in fact but only adduce sufficient evidence to demonstrate that a profitable venture might reasonably be expected to result. This is the proper test. *United States v. Harper*, 8 IBLA 357, 365-367 (1972).

We have reviewed the record and we find ourselves in agreement with the Judge's determination of lack of discovery with respect to the Swamp and Extension of Swamp claims. For the reasons set out below, we do not consider the Enterprise claim along with the above two claims.

As to the Enterprise claim, we move on to appellant's second argument that the evidence of lack of discovery on a portion of the claim is insufficient to establish a *prima facie* case as to the whole claim.

In a case of this nature, the Government has by practice assumed the burden of establishing a *prima facie* case that there has not been a discovery of a valuable mineral deposit within the mining claim. *Foster v. Seaton*, 271 F.2d 836, 838 (D.C. Cir. 1959); *United States v. Alarco*, 9 IBLA 1, 3 (1973).

Anderson testified that he examined both the California and Oregon sections of the Enterprise claim. He noted that the southern portion of the claim extending into California had been thoroughly mined. (Tr. 25.) He took samples from areas within Oregon recommended by the applicant. (Tr. 45, 50.) He was not directed to any area in the California portion.

It is well established that a government mineral examiner need not explore or sample beyond those areas which have been exposed by the claimant. The examiner is simply verifying whether a discovery has been made; he is not required to perform the discovery work for the

claimant. *United States v. Wells*, 11 IBLA 253, 263 (1973); *United States v. Kelty*, 11 IBLA 38, 42 (1973); *United States v. Grigg*, 8 IBLA 331, 343, 79 I.D. 682 (1972). Anderson was not required to take samples from the unexposed areas on the California portion of the claim.

Anderson's testimony that he examined the mining claim and workings thereon and sampled the areas recommended by appellant but found no evidence of a valuable mineral deposit was sufficient to establish a prima facie case by the Government that there had not been a discovery as to the whole claim. *United States v. Jones*, 2 IBLA 140, 148 (1971). Thereupon, the contestee was required to prove by a preponderance of the evidence that a discovery did exist on the claim. *United States v. Nichol*, 9 IBLA 117, 122 (1973). The appellant failed to meet its burden of proving a discovery existed on the Enterprise claim. A mining claim is properly declared invalid where the Government establishes a prima facie case of lack of discovery and the claimant does not show by a preponderance of evidence that the claim is valid. *United States v. Taylor*, 11 IBLA 119, 123 (1973); *United States v. Mellos*, 10 IBLA 261, 267 (1973); *United States v. Dotson*, 10 IBLA 146, 147 (1973).

There is, however, another aspect to appellant's contention that goes beyond the issue of discovery. Although appellant couches its argument in terms of an inadequate prima facie case, the real issue is the

sufficiency of the proceedings leading to the hearing. The thrust of appellant's contention is that the preliminary proceedings were deficient as to the Enterprise claim, leaving the Department without jurisdiction to hold a hearing covering it.

As noted above, the Enterprise claim lies in both Oregon and California. The notice of publication and appellant's verified statement, both required by § 5 of the Act,¹ only described land situated within Oregon.

¹ Section 5 of the Act reads in pertinent part:

"(a) The head of a Federal department or agency which has the responsibility for administering surface resources of any lands belonging to the United States may file as to such lands in the Office of the Secretary of the Interior, or in such office as the Secretary of the Interior may designate, a request for publication of notice to mining claimants, for determination of surface rights, which request shall contain a description of the lands covered thereby, showing the section or sections of the public land surveys which embrace the lands covered by such request, or if such lands are unsurveyed, either the section or sections which would probably embrace such lands when the public land surveys are extended to such lands or a tie by courses and distances to an approved United States mineral monument. . . .

* * * * *

Such notice shall describe the lands covered by such request, as provided heretofore, and shall notify whomever it may concern that if any person claiming or asserting under, or by virtue of, any unpatented mining claim heretofore located, rights as to such lands or any part thereof, shall fail to file in the office where such request for publication was filed (which office shall be specified in such notice) and within one hundred and fifty days from the date of the first publication of such notice (which date shall be specified in such notice), a verified statement which shall set forth, as to such unpatented mining claim—

- (1) the date of location;
- (2) the book and page of recordation of the notice or certificate of location;
- (3) the section or sections of the public land surveys which embrace such mining

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Section 5 requires a mining claimant to set forth all of the sections of public land in which his claim lies. This the appellant admittedly failed to do. Its neglect has led directly to the difficulty in which we find ourselves. If the verified statement had been known to be defective when it was filed and had not been corrected within the 150-day period, it would have been rejected and then there would have been no further proceedings.²

The statement as filed is not defective on its face, since a claim could

claims; or if such lands are unsurveyed, either the section or sections which would probably embrace such mining claim when the public land surveys are extended to such lands or a tie by courses and distances to an approved United States mineral monument;

(4) whether such claimant is a locator or purchaser under such location; and

(5) the name and address of such claimant and names and addresses so far as known to the claimant of any other person or persons claiming any interest or interests in or under such unpatented mining claim; such failure shall be conclusively deemed (i) to constitute a waiver and relinquishment by such mining claimant of any right, title, or interest under such mining claim contrary to or in conflict with the limitations or restrictions specified in section 4 of this Act as to hereafter located unpatented mining claims, and (ii) to constitute a consent by such mining claimant that such mining claim, prior to issuance of patent therefor, shall be subject to the limitations and restrictions specified in section 4 of this Act as to hereafter located unpatented mining claims, and (iii) to preclude thereafter, prior to issuance of patent, any assertion by such mining claimant of any right or title to or interest in or under such mining claim contrary to or in conflict with the limitations or restrictions specified in section 4 of this Act as to hereafter located unpatented mining claims."

² While a verified statement may be corrected after the 150 days have elapsed, it may not be amended to assert rights in lands other than those identified prior to the expiration of that period. *Weeds Point Mining Company*, A-30799 (November 2, 1962); see *Ted R. Wagner*, 69 I.D. 186 (1962).

exist limited to the sections it described. But at the hearing the mining claimant stated and still insists that its claim covers other lands. It also asserts that the procedure as to the Enterprise is invalid. Yet the reason the procedure is invalid, if so it be, is because Mineral Ventures, Ltd. (or its predecessors) filed a defective verified statement.

To decide the effect of a section 5 proceeding involving only a part of a mining claim, we turn first to an examination of the statute.

The steps leading up to a hearing under section 5 begin with a decision by the head of a federal department or agency who has responsibility for administering surface resources of lands belonging to the United States that he believes that a determination is desirable to ascertain who controls the surface rights to certain of such lands. The lands are then examined to discover whether anyone is in actual possession or engaged in working them. The agency head must also have a search made of "tract indexes" in the proper county office of record, if such there be. The agency or department head then files a request with the Secretary of the Interior for publication of a notice for determination of surface rights describing the section or sections of public lands embracing the lands covered by the request.

The Secretary of the Interior then directs publication of the notice describing the lands covered by the request. The notice is directed to any person claiming or asserting rights to such lands by virtue of an

unpatented mining claim. So far the proceedings are directed solely to the lands covered by the request.

In response to the notice a mining claimant desiring to assert rights to the surface resources in any of such lands must file a verified statement. The verified statement must set forth certain information as to the unpatented mining claim. For our purpose, one item is particularly important. He must set forth "the section or sections of the public land surveys which embrace such mining claims." Sec. 5(a)(3), 30 U.S.C. § 613 (1970).

In other words, a mining claimant must describe all of the sections of public land in which his claim lies.

Here for the first time lands not covered by the "determination" request are brought into the proceedings.

Up to this point the on-the-ground and record examinations have been directed to the land with which the administering agency is concerned. In the verified statement the mining claimant has an opportunity and is required to identify his mining claim and all the sections of public land it covers. The statute then speaks in terms of a "mining claim."

As the Administrative Law Judge pointed out, the verified statement filed on September 21, 1960, by the then owners of the Enterprise,³

³ These owners were the heirs of one Harry Lee Akerill. The appellant is a corporation whose president is a grandson of Akerill and whose stockholders, for the most part, are members of the family. The corporation is the successor in interest to the mining claimants who filed the verified statement. (Tr. 56.)

stated that the three mining claims, including the Enterprise, were located in Sec. 13, T. 41 S., R. 7 W., Willamette Meridian, Oregon. It made no reference to land in California.

In August of 1970, appellant submitted to the Forest Service a copy of an unrecorded quitclaim deed describing and conveying only lands in Oregon. Although the deed does not name any mining claims, the description covers the portion of the Enterprise claim in Oregon. There is no indication in the record whether another deed conveyed the California portion of the Enterprise.

At the opening of the hearing appellant's attorney asserted that the Enterprise extended into California (Tr. 8), but offered nothing to show how appellant had acquired title to the California portion. Appellant calls attention to a letter dated March 11, 1966, from its attorney to Clover F. Anderson, the Forest Service mineral examiner who testified at the hearing, which states that the claims were partly in California and partly in Oregon. However, in its answer to the complaint, appellant stated that the Enterprise, and the two other claims were situated in sec. 13, T. 41 S., R. 7 W., W.M., Joseph [sic] County, Oregon. No mention was made of California.

The difficulties surfaced at the beginning of the hearing. When appellant offered Exhibit M, the Government objected on the ground that it referred to California. (Tr.

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8.) The following colloquy then occurred:

MR. WALL: B, C, E, F, G, H, I, and N, but M is from California and not before the Court today, the California property.

MR. MURRAY: We don't understand that this is the situation, that we are going to divide the claims in two. The California line goes right through the claims and according to the notice we understood the entire claim would be tried, whether they are in California or Oregon. So, this certainly will make a confusing situation if we have two hearings. Of course, we would abide by whatever you desire and just limit our testimony to grounds that are in the State of Oregon and ask that those parts of the claims based on counsel statement, which are not in issue in California be dismissed and the proceedings be dismissed as to those parts of the claims in California, based upon the statement made by the Government.

THE COURT: 'Course I received very little information in the transmittal that comes from the Bureau of Land Management and at present there is no map or graph of the claim in the file transmitted to the hearings division. I note that the transmittal of proceedings for hearings refers to No. -09999 -E and land involved being in the County of Josephine, Oregon and the notices which have been issued state Enterprise Placer, Swamp, Extension of Swamp Mining Claim located in Section 13, Josephine County, Oregon.

Mr. Murray, you are indicating that one or more of those claims runs from Josephine County down into California?

MR. MURRAY: The Enterprise Claim is partially in Oregon, partially in California.

I didn't realize that the notice had specifically specified Oregon, I think probably counsel is right that the only issue that can be tried now are the lands in Oregon and therefore we would have

to exclude in this hearing the part of the Enterprise Claim which extends into California.

THE COURT: Well, I would say that the Government would have the right to take that position. I'm not sure that that's a fortunate thing with respect to the proposition that has been discussed, mainly the question of two hearings with perhaps duplicated testimony but—

* * * * *

THE COURT: * * * I'm going to examine the transmittal from—I note that the transmittal letter from the United States Forest Service to Bureau of Land Management, dated September 11, 1970, also restricts the request for a hearing to the claims within the State of Oregon and once more I would like to indicate that until I came to this hearing today, I had no idea that the claims extended down into California. I don't believe there is anything in the file which has been furnished to me which would have cast some light on this matter.

MR. WALL: The verified statement is addressed to the Oregon property only.

THE COURT: Well, Mr. Wall, you regard it is a practical and economical matter to break this up and have two hearings if that's what the agency desires?

MR. WALL: Well, the verified statements filed with the Court are only for the Oregon property.

THE COURT: Oh, I see.

MR. WALL: The claimant was responsible for that.

THE COURT: Off the record.
(OFF THE RECORD)

THE COURT: I will allow the parties to preserve their respective positions concerning the status of the portion of the claim which is in California taking into account the statement which Mr. Wall has just made, mainly that the verified statement in this matter also seems to cover only claims said to be situated in the County of Josephine, State of Oregon.

(Tr. 8, 9, 10 and 11).

We cannot determine from the transcript or the Judge's decision whether either party offered all the evidence it wanted to concerning the California land. There is some testimony commenting on its having been extensively mined, but such evidence was apparently incidental. The Judge commented that the Government probably could not attack a claim piecemeal but found the Government had acted in a reasonable and proper fashion. He then found the whole of the Enterprise lacking in a discovery.

The Judge did not restrict his findings to the Oregon portion of the Enterprise. Indeed, if he had, his finding would have been ineffectual. While section 5 of the Act does not explicitly state that the whole claim must be challenged at the hearing, this requirement is a natural outgrowth of the test utilized in determining whether a mining area is subject to the limitations and restrictions of section 4 of the Act, *viz.*, whether a discovery of a valuable mineral deposit has been made *within the limits of the claim*.

Under the mining laws one discovery anywhere on a claim is sufficient to constitute a discovery as to the whole claim. *United States v. McCall*, 7 IBLA 21, 26 (1972); *Ferrell v. Hoge*, 29 L.D. 12, 15 (1899). The pertinent regulation 43 CFR 3342.1-1 reads:

But one discovery of a mineral is required to support a placer location, whether it be of 20 acres by an individual

or 160 acres or less by an association of persons.

Inasmuch as one discovery anywhere on a claim is sufficient to constitute a discovery under the mining laws, a hearing directed to a portion of a claim is insufficient to establish an absence of a discovery as to the whole claim. This follows from the fact that the locator may still have a valuable mineral deposit on that portion of the claim that was not challenged by the Government.

The Board does not mean to suggest that the Government, being required to challenge the whole claim, must then assume control over the total area should it prevail in its challenge. The Government may choose to exercise control over whatever portion it deems necessary in the public interest. What is required is that the claim as a whole must be involved in the hearing and be found to be lacking in a discovery before the Government can assume control over any part of the claim.

Although the Government may have failed to properly challenge the entire Enterprise claim at the hearing, we are of the opinion that the appellant's predecessors initiated the problem by submitting an incomplete description of the Enterprise claim in their verified statements, and the appellant compounded it by its own actions, *i.e.*, its deed and its answer. The record now before us establishes that the verified statement was defective and should have been rejected, if all the facts had been known. We now

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have the pertinent facts. Accordingly, we find the verified statement defective as to the Enterprise claim and reject it. Therefore, we find that, as to this claim, Mineral Ventures, Ltd. has waived its rights as provided in sec. 5. *See* n. 1. The Judge's decision is modified to make this the basis for finding that the Enterprise claim is subject to the limitations of sec. 4.

The principal effect of such waiver is the limitation prior to patent as to management and disposition of vegetative surface resources. Appellant may proceed to develop its claim, and it remains entitled to all subsurface rights it had prior to the proceedings. It is also entitled to those surface resources reasonably necessary for conducting its mining operations. *United States v. Trussel*, 7 IBLA 225, 228 (1972); *Arthur L. Rankin*, 73 I.D. 305, 311 (1966).⁴ Should patent subsequently issue to appellant for the claims in issue, the reservations, limitations and restrictions imposed by the Act in favor of the United States would cease to exist. 30 U.S.C. § 615 (1970).

Appellant's third argument deals with defects of a technical nature relating to Government Exhibit 13, "Affidavit of Examination," Exhibit 14, "Notice of Publication," and Exhibit 15, "Certificate of Non-Exist-

ence of Tract Indexes." It argues that Government errors with respect to these items caused the Office of Hearings and Appeals to lose jurisdiction to adjudicate all of the claims under the Surface Resources Act, 30 U.S.C. § 613 (1970). The Judge denied appellant's request for dismissal of the proceeding based upon these jurisdictional grounds.

With respect to Exhibit 15, appellant argues that sec. 613 of the Act requires that a certificate of title be supplied by the Government. Appellant argues that tender of a certificate of nonexistence of tract indexes does not meet the requirements of the section. In the District Court opinion in *Converse v. Udall*, 262 F. Supp. 583, 592 (D.C. Or. 1966), *aff'd*, 399 F.2d 616 (9th Cir. 1968), *cert. den.*, 393 U.S. 1025 (1969), the Court disposed of an identical argument and stated:

No request for publication was accompanied by the required certificate of title or abstract of title. Here the plaintiffs are technically correct, as the defendant could not comply with the literal wording of the statute due to the fact that there were no tract indexes of the land in question maintained in the records of Linn and Crook Counties. Because of this fact, defendant instead submitted certificates of the nonexistence of the tract indexes. Obviously, compliance was impossible and the point does not go to the merits.

We have already considered the consequences of the fact that Exhibit 14, the notice of publication, did not describe all the land in the Enterprise claim. As noted above, such description is not required.

⁴ These constraints are equally applicable to the Swamp and Extension of Swamp claims. The Administrative Law Judge did not hold these claims void. He merely held the limitations of section 4 of the Act applied. Appellant still has the claims, can work them, and can apply for a patent.

The notice of publication and the affidavit of examination are required by 30 U.S.C. § 613 (1970), in order to assure that the proper parties are given notice of the Government's action. Appellant was completely informed of the proceeding against its claims. There is no indication that the appellant was in any way prejudiced by any of the alleged deficiencies in these two exhibits. The Judge stated in his decision, p. 2:

There is no indication that any deficiencies which may exist in these areas have been prejudicial to the interests of Mineral Ventures, Ltd. (the only mining claimant in this proceeding), or have affected that corporation's opportunity to be represented and heard in this matter. In fact, a hearing originally scheduled for January, 1972, was canceled after requests of the mining claimant's attorney, who advised that he required a longer period for preparation. He requested a hearing for September, 1972. The hearing was held on October 24, 1972.

In the past, this Board has held that technical deficiencies will not defeat the Government's case where there is no showing that the claimant was in any way misled, confused or prejudiced by the errors. *Mrs. Mildred Carnahan*, 10 IBLA 150, 156 (1973), *United States v. Stewart*, 1 IBLA 161, 165 (1970); see also the D.C. opinion, *Converse v. Udall*, *supra*, p. 592. After reviewing the record, we find that the deficiencies, if any there were, in no way prejudiced the appellant. Accordingly, the Board finds itself in full agreement with the Judge's ruling on this matter.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision is affirmed as modified.

MARTIN RITVO, *Member*.

WE CONCUR:

JOAN B. THOMPSON, *Member*.

FREDERICK FISHMAN, *Member*.

CLINCHFIELD COAL COMPANY

2 IBMA 364

Decided *December 14, 1973*

Appeal by Clinchfield Coal Company from a decision and order dated February 15, 1973, assessing penalties in Docket No. MORG 72-67-P for violations of the Federal Coal Mine Health and Safety Act of 1969.

Affirmed.

Federal Coal Mine Health and Safety Act of 1969: Mandatory Safety Standards: Grounding

Use of a clamp to ground an electric hand drill is a violation of 30 CFR 75.701-3 unless approved by an inspector or some other authorized representative of the Secretary.

Federal Coal Mine Health and Safety Act of 1969: Mandatory Safety Standards: Trailing Cable Splices

Under section 306 of the Act, 30 CFR 75.603, only one temporary splice may be made in a trailing cable at one time.

APPEARANCES: Robert P. Reinecke, Esq., Wesley C. Marsh, Esq., and Ray-

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mond C. Davis, Esq., for appellant, Clinchfield Coal Company; Robert W. Long, Esq., Associate Solicitor, J. Philip Smith, Esq., Assistant Solicitor, Mark M. Pierce, Trial Attorney, for appellee, Mining Enforcement and Safety Administration.

OPINION BY MR. DOANE
INTERIOR BOARD OF MINE
OPERATIONS APPEALS

Clinchfield Coal Company appeals to the Board to reverse or at least modify a decision by an Administrative Law Judge (Judge) dated February 15, 1973, assessing penalties in Docket No. MORG 72-67-P for various violations of the Federal Coal Mine Health and Safety Act of 1969.¹ Having reviewed the record and considered the briefs, we have concluded that the decision should be affirmed.²

Appellant argues that the Judge erroneously denied its motion to suppress evidence based upon the Fourth Amendment prohibition of unreasonable searches. Clinchfield also claims that the Judge failed to give sufficient rulings on its proposed findings of fact and conclusions of law. We have already rejected arguments similar to these in *Buffalo Mining Company*³ and ap-

pellant has shown no reason why we should reconsider our previously stated positions.⁴

Apart from these general challenges to the decision, appellant also attacks the Judge's rulings with respect to certain specific violations. First, Clinchfield maintains that Notice No. 3 L.D.P., May 26, 1971, should be vacated because the clamp that was being used was, contrary to the inspector's opinion, sufficient grounding for an electric hand drill. Under 30 CFR 75.701-3, the use of a clamp as a method of grounding must be approved by the inspector or some other authorized representative of the Secretary. The record reveals that there was no such approval and we are of the opinion that the Judge correctly concluded that a violation did occur. Second, Clinchfield insists that section 306 of the Act⁵ does not prohibit the making of more than one temporary splice in a trailing cable. We hold that the authorization in that provision for one temporary splice in a trailing cable, which may then be used for a twenty-four hour period, necessarily precludes the making of any other such splice at the same time.⁶ A contrary interpretation would represent an unduly narrow construction of the Act which must be construed liberally in light of its broad remedial purposes.⁷

¹ P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1969).

² On April 23, 1973, the Board issued an order granting a motion to strike all reference in Appellant's brief with respect to the National Environmental Policy Act of 1969.

³ 2 IBMA 226, 80 I.D. 630, CCH Employment Safety and Health Guide par. 16,618 (1973).

⁴ See *Youghiogheny and Ohio Coal Co. v. Morton*, No. 72-78 (S.D. Ohio, September 19, 1973).

⁵ 30 CFR 75.603.

⁶ *Expressio unius est exclusio alterius*.

⁷ *Op. cit.*, footnote 4.

Appellant's brief contains other contentions, all of which are without merit and too insubstantial to require discussion.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision in the above entitled case IS AFFIRMED and the penalties assessed in the aggregate amount of \$1,600 shall be paid on or before thirty days from the date of this decision.

DAVID DOANE, *Member.*

I CONCUR:

C. E. ROGERS, JR., *Chairman.*

ADMINISTRATIVE APPEAL OF FRANCES M. SHIVELY, KEVERN (CROW ALLOTTEE NO. 3519)

2 IBIA 123

Decided December 20, 1973

Appeal from the decision of the Area Director, Bureau of Indian Affairs, affirming the decision of the Superintendent, Crow Agency, withholding approval of application for a fee patent to lands for which a trust patent has been issued.

Reversed and remanded.

Indian Lands: Patents—Indians:
Competency

A Crow Indian's application for a patent in fee to lands for which a trust patent

has been issued will be determined on the basis of general statutory provisions in that respect, and a decision to withhold fee patent will be overturned on appeal where there is an abuse of administrative discretion and where the record supports the conclusion that the applicant is capable of properly managing his or her own affairs.

APPEARANCES: Harold G. Stanton, Esq., of Stanton, Hovland and Torske, for appellant.

OPINION BY MR. SABAGH INTERIOR BOARD OF INDIAN APPEALS

On or about April 17, 1973, the appellant, an enrolled Crow Indian, made application for fee patent covering five allotments¹ for lands she owned on the Crow Reservation in Montana, totaling 2,084.34 acres.² The Superintendent, Crow Agency, notified appellant through counsel that he had sent a letter to the Area Director, Bureau of Indian Affairs, Billings, Montana, on May 17, 1973, recommending withholding of action on appellant's application. The applicant filed a timely appeal with the Area Director. On June 8, 1973, the Acting Area Director issued a letter decision sustaining the Superintendent withholding approval of the application.

In his decision of June 8, 1973, the Acting Area Director, gave as his reasons for sustaining the Superintendent the following:

¹ Crow allotment Nos. 2057, 2058, 2059, 3518 and 3519.

² 485.8 acres were classified as dry cropland. 1,598.54 acres were classified as pasture land.

KEVERN CROW ALLOTTEE NO. 3519

December 20, 1973

The Crow Tribe has expressed an interest in purchasing all five tracts of Mrs. Kevern's land. Accordingly, we intend to withhold approval of this application at this time in order to allow the Tribe to enter into negotiations with Mrs. Kevern. We will notify the Superintendent and the appropriate tribal officials of this decision in order that they may expedite communication with your client.

In support of the desire of Indians across the Nation to retain their lands in trust status whenever possible, new regulations for 25 CFR 121 have become effective April 24, (sic) 1973, by publication in the Federal Register, Volume 38, No. 78, Page 10080. We draw your attention to the new Part 121.2 entitled "Withholding action on application" which states in pertinent part as follows:

Action on any application, which if approved would remove Indian land from restricted or trust status, may be withheld, if the Secretary determines that such removal would adversely affect the best interest of other Indians, or the tribes, until the other Indians or the tribes so affected have (sic) [had] a reasonable opportunity to acquire the land from the applicant * * *

The balance of the part provides that the applicant may appeal the withholding action under the same appeal procedure currently in use.

The sum total of these considerations is such that we think this is a proper case for the discretion afforded the Secretary of the Interior by the Acts of February 8, 1887 (24 Stat. 390) and May 8, 1906 (34 Stat. 82) for use in such instances, and we concur in the recommendation of the Superintendent that approval be withheld on these applications for now.

Mrs. Kevern appealed the decision of the Acting Area Director to the Secretary of the Interior on or about June 27, 1973, and the matter

was referred to this Board pursuant to a special delegation.

Notice of Docketing of the appeal was mailed to the appellant and the Area Director. Appellant was allowed 30 days within which to file an appeal brief and the Area Director was allowed 20 days from the date of receipt of appellant's brief to reply.

The appellant timely filed an appeal brief which was duly served by certified mail, return receipt requested, on the Area Director, Bureau of Indian Affairs, Billings, Montana. No reply was filed by the Area Director, and the time for filing has expired.

The appellant among other things contends that the action of the Bureau of Indian Affairs in withholding approval of the application for a fee patent was an arbitrary and capricious use of discretion.

The law applicable to the case follows. Section 5 of the General Allotment Act, February 8, 1887, 24 Stat. 389, 25 U.S.C.A. § 348, provides in pertinent part that—

* * * [U]pon the approval of allotments * * *, by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, * * * and that at the expiration of said period the United States will convey the same by patent to said Indian * * *, in fee, discharged of said trust and free of all charge or incumbrance whatever:

Provided, That the President of the United States may in any case in his discretion extend the period.* * * (Italics supplied.) * * *

The period in question has been extended by presidential action.

Section 6 of the General Allotment Act, May 8, 1906 (34 Stat. 182), 25 U.S.C.A. 349, *as amended*, provides in pertinent part:

That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee * * * then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside * * * *Provided*, That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed * * *. (Italic supplied.)

See Acting Area Director's decision of June 8, 1973, *supra*, for the contents of 25 CFR 121.2, effective May 23, 1973, entitled "Withhold-action on application."

We are of the opinion that the contents of the General Allotment Act referred to *supra*, clearly express the legislative intent and the dictates of Congress, *i.e.*, that the United States will cause to be issued to the allottee a patent in fee simple, if before the expiration of the trust period the Indian allottee becomes competent and capable of managing his or her own affairs.

Several cases consider patents as merely evidence of the completed

and vested allotment. After compliance with the acts of Congress and agreements relative to the distribution of Indian lands, the allottee's title becomes absolute, and the execution and delivery of patents are thereafter merely ministerial acts, *Woods v. Gleason*, 43 Okla. 9, 140 P. 418 (1914). A trust patent is simply "a piece of paper or writing, improperly called a patent" designated to show that at the end of 25 years the Indian allottee or his heirs will receive the fee to the land allotted. See *United States v. Rickert*, 188 U.S. 432, 436 (1903).

It is not probable that the issuance of these fee patents was considered essential in order to give the Indian unrestricted fee title, but they were issued because it was apparently believed that fee title now existed and that a fee title patent would be more convenient for the Indian and his vendees. A title tantamount to fee by reason of legislative enactment existed in the allottee. *United States v. Spaeth*, 24 F. Supp. 465 (D.C. Minn. 1938).

We agree however that because of the variety of allotment laws, a case under one is not necessarily applicable to another. We conclude under the present circumstances that the Bureau of Indian Affairs was and is clothed with the discretion to *determine the competency of the individual Indian to manage his or her own affairs*.

There has been no moratorium on the approval of patent applications on the Crow Reservation during the period April 17, 1972, to the present.

December 20, 1973

The Acting Area Director's position is that Indian allottees who wish to dispose of their interest in Indian land holdings owe some allegiance and duty to assist their tribe in retaining same in tribal ownership. See Acting Area Director's letter decision of June 8, 1973, *supra*. He consequently did not approve or disapprove the appellant's application until as he said, the Tribe had a reasonable opportunity to acquire the land from the applicant.

In the transmittal of the appeal to the Secretary on July 19, the Area Director used the phrase, "We feel that *a generous length of time* should be provided for the Tribe to formulate its land purchase program * * *." (Italics supplied.)

It is common knowledge in cases such as this in which there is a competent Indian, without debt or family responsibility, that the Bureau of Indian Affairs would approve the application for a fee patent. We take official notice thereof.

We come now to the question of whether the Bureau has the authority to withhold approval of an application for a fee patent until other Indians or the Tribe so affected had a reasonable opportunity to acquire the land from the applicant?

Conceding that an Indian *may* owe a moral obligation to the Tribe or his brethren, we find no law, statutory or otherwise sustaining the Area Director's position.

We are of the opinion that the language contained in *Arenas v. United States* though not factually on all fours with the case at bar is nonetheless applicable here. See 8 U.S.S.Ct. Digest 685 (1970).

* * * A departmental change in policy is insufficient to warrant the Secretary of the Interior in refusing to grant patents of reservation lands * * * to Indian allottees where no absolute discretion in the matter is reserved to the Secretary of the Interior by the Act of Congress authorizing such allotments and the prescribed method of allotment has been complied with. * * *

The Judge in *Arenas v. United States*, 322 U.S. 419, 432 (1944), said the following:

* * * But courts are not to determine questions of Indian land policy nor can the Secretary on grounds of policy deprive an allottee of any rights he may have acquired in his allotment. To separate questions of right from questions of policy requires judicial examination of any well pleaded allegation of the complaint and any grounds advanced for refusal of the patent. Even in some discretionary matters, it has been held that if an official acts solely on grounds which misapprehend the legal rights of the parties, an otherwise unreviewable discretion may become subject to correction.

The appellant who is 63 years of age with two years of college education, has conducted her own business affairs for the last 40 years which includes leasing her own land. She has resided off the reservation for the past many years. She now wishes to retire from her employment in Phoenix, Arizona, and move to Yachata, Oregon, where she with her husband purchased a new home.

They have no children. These facts are not disputed by the Bureau.

From an examination of the statutes and amendments thereto applicable to the Crow Tribe, it appears that certain of its members were classified as competent in connection with the Crow rolls established under the Act of June 4, 1920 (41 Stat. 751). At any rate, the Bureau had ample opportunity since April 1972 to determine the competency of the appellant. Upon examining the record we find that the Bureau had determined to its own satisfaction at least as far back as the first week in November 1972 that the appellant was competent to manage her own affairs. The Bureau did not choose however, to act on the appellant's application for fee patent until June 8, 1973, when it withheld approval thereof.

We are of the opinion that the Bureau is charged with the responsibility of the management of its trust obligations in the best interest of the Indian beneficiaries. We hold that this fiduciary duty carries with it—if not express—at least an implied requirement of diligence.

It is obvious that the Bureau had ample opportunity from April 1972 to the effective date of the new regulation, *supra*, entitled "Withholding action on application" to either approve or disapprove appellant's application.

Assuming *arguendo* that the individual Indian owed the Tribe a certain moral duty, *i.e.*, giving them a reasonable opportunity to acquire the land, does not the Tribe owe the

appellant a corresponding duty? We think it does.

From April 1972 to the present, the record is void of evidence of any effort on the part of the Tribe to approach or to negotiate with the appellant. We find that the Tribe was aware of the appellant's intentions at least as far back as October 1972. We further find in keeping with the intent of the Bureau that the Tribe has had a reasonable opportunity to negotiate with the appellant since October 1972 but instead chose to remain silent to the detriment of the appellant. This decision shall not act as a bar against any effort at negotiation for purchase which the tribe wishes to initiate prior to the actual delivery of the patent.

We find that the appellant was competent to manage her own business affairs and as such her application for fee patent should have been approved. The Tribe had reasonable opportunity from October 1972 to negotiate with the applicant but instead chose not to. We further find that the failure of the Bureau to approve the application and to obtain the issuance of a fee patent was an arbitrary and undue exercise of authority.

NOW, THEREFORE, by virtue of the special authority delegated to the Board of Indian Appeals by the Secretary of the Interior, we reverse the Area Director and ORDER the Bureau of Indian Affairs to immediately prepare all necessary papers incident to the issuance of a fee patent and to refer same to the Bureau of Land Management for

December 27, 1973

the issuance of fee patent or patents to the appellant.

Final for the Department.

MITCHELL J. SABAGH, *Member*.

I CONCUR:

DAVID J. MCKEE, *Chairman*.

**ESTATE OF YASHAKE OBI
(QUINAIELT ALLOTTEE
NO. 1279 DECEASED)**

2 IBIA 135

Decided *December 27, 1973*

Petition to Reopen.

Denied.

**375.1 Indian Probate: Reopening:
Waiver of Time Limitation**

Petition to reopen filed more than three years after the final determination of heirs will not be granted unless there is compelling proof that the delay was not occasioned by the lack of diligence on the part of the petitioning party.

**375.1 Indian Probate: Reopening:
Waiver of Time Limitation**

It is in the public interest to require Indian probate proceedings be concluded within some reasonable time in order that property rights of heirs and devisees in Indian allotments be stabilized.

APPEARANCES: Gladys Phillips, Esq., for petitioner, Harold George.

**OPINION BY MR. WILSON
INTERIOR BOARD OF
INDIAN APPEALS**

This matter comes before the Board upon a petition for reopen-

ing of probate filed by Gladys Phillips, Esq., for and in behalf of Harold George, hereinafter referred to as petitioner, pursuant to 43 CFR 4.242.

The estate herein having been closed for more than three years the matter was properly forwarded to the Board of Indian Appeals by Administrative Law Judge Richard J. Montgomery in accordance with the provisions of 43 CFR 4.242(h).

The decedent according to the records died intestate about 1914. The estate, however, was not probated until November 18, 1930, due probably to the lack of communication regarding the date of death.

In support of his petition to reopen the petitioner alleges that he had no actual notice of the probate proceedings and that he was not on the reservation or otherwise in the vicinity at any time while the public notices of the hearing were posted.

Notwithstanding the fact he may not have had actual notice as alleged there is nothing in the petition or probate record indicating any effort on the part of the petitioner over the period of some 34 years to inquire into, or assert any right or claim in the estate. The petition or the probate record furthermore does not indicate that the petitioner was under a disability, due to minority or lack of competence, during these years which would have precluded him from inquiring into or asserting a claim in the estate. Moreover, the petitioner has failed to show the existence of

a manifest injustice resulting from his omission as an heir in the estate.

The Department of the Interior over the years has consistently adhered to a strict policy of refusing to entertain appeals not timely filed. *Estate of Ralyen Rabyea Voorhees*, 1 IBIA 62 (1971). The same policy is applicable to petitions for reopening filed beyond the three-year limitation provided in the regulations, *Estate of George Minkey*, 1 IBIA 1 (1970), affirmed on reconsideration, 1 IBIA 56 (1970).

The Board is not unmindful of the Secretary's power under 25 CFR 1.2 to waive and make exceptions to his regulations in Indian probate matters. However, such authority or power will be exercised only in cases where the most compelling reasons are present. *Estate of Charles Ellis*, IA-1242 (April 14, 1966); *Estate of George Minkey, supra*. Reopening of estates will be permitted only where it appears that the petitioner has not been dilatory in seeking his remedy. *Estate of Alvin Hudson*, IA-P-17 (May 29, 1969); *Estate of George Squawlie (Squally)*, IA-1231 (April 5, 1966); *Estate of George Minkey, supra*; *Estate of Sophie Iron Beaver Fisherman*, 2 IBIA 83, 80 I.D. 665 (1973).

Moreover, the public interest requires Indian probate proceedings be concluded within some reasonable time in order that property rights of legitimate heirs and devisees be stabilized. *Estate of Abel Gravelle*, IA-75 (April 11, 1952). To hold property rights of heirs to allotted lands forever subject to challenge,

would not only constitute an abuse, but would seriously erode the property rights of those whose heirship in land has already been determined. *Estate of Samuel Picknoll (Pickernell)*, 1 IBIA 168, 78 I.D. 325 (1971).

It is the finding of the Board that Harold George's petition for reopening falls short of meeting the requisite standards set forth in above-cited cases to justify the exercise of Secretarial discretion to waive the three-year limitation contained in 43 CFR 4.242(a). Accordingly, the petition must be denied.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition to reopen filed by Harold George IS DENIED and the order determining heirs entered under date of November 18, 1930, IS AFFIRMED.

This decision is final for the Department.

ALEXANDER H. WILSON, *Member*.

I CONCUR:

DAVID J. MCKEE, *Chairman*.

PAXTON J. SULLIVAN

14 IBIA 120

Decided December 28, 1973

Appeal from decision of the Fairbanks District Office, Alaska, Bureau of Land Management, rejecting application for homestead entry serial No. F-19307.

December 28, 1973

Affirmed.**Homesteads (Ordinary): Lands Subject to—Withdrawals and Reservations: Effect of**

Where land included in a homestead entry is described among lands withdrawn subject to valid existing rights, the withdrawal attaches to the land upon cancellation of the homestead entry.

Public lands which are withdrawn from all forms of appropriation under the public land laws, except location for metaliferous minerals under the mining laws, are not subject to entry under the homestead laws.

APPEARANCES: Joseph Rudd, Esq., Ely, Guess and Rudd, of Anchorage, Alaska, for appellant.

OPINION BY MR. GOSS
INTERIOR BOARD OF LAND
APPEALS

Paxton J. Sullivan has appealed to the Secretary of the Interior from a decision of the Manager, Fairbanks District Office, Bureau of Land Management, dated May 18, 1973, rejecting his application for homestead entry.

Appellant's application, filed October 16, 1972, was rejected for the reason that the land applied for was withdrawn from entry by Public Land Order 5150 on December 27, 1971, 36 F.R. 25410, and by Public Land Order No. 5180 on March 9, 1972, 37 F.R. 5583.

Appellant contends in his statement of reasons that the lands involved were included within the

homestead entry of Don D. Magee (F-484) prior to the date of the two withdrawal orders cited by the District Manager. Appellant states that Mr. Magee's entry expired without the filing of final proof on or about March 30, 1972. Appellant argues that since, at the time of the withdrawals, the lands were covered by the existing valid homestead entry, the lands were excepted from the operation of the withdrawal orders in accordance with the provision in the orders "subject to valid existing rights."

Where land in an existing homestead entry is described among other lands in a withdrawal order, the withdrawal becomes effective as to such land as soon as the existing entry is canceled. *Walter Pedersen*, A-27734 (December 17, 1958); *see also, Solicitor's Opinion*, 55 I.D. 205 (1935). Assuming the facts to be as appellant relates, the withdrawal would be effective except as to the existing rights of entryman Magee. When Magee's entry expired, the withdrawal attached to the land unconditionally and prevented any subsequent homestead entry thereon.

A public land application embracing land in a withdrawal must be rejected. *Curtis Wheeler*, 8 IBLA 148 (1972). Departmental regulation 43 CFR 2091.1 specifically provides in part that:

* * * applications which are accepted for filing must be rejected and cannot be

held pending possible future availability of the land or interests in the land, when approval of the application is prevented by:

(a) Withdrawal or reservation of the lands;

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of

the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

JOSEPH W. GOSS, *Member*.

WE CONCUR:

ANNE POINDEXTER LEWIS, *Member*.

JOAN B. THOMPSON, *Member*.

INDEX-DIGEST

(Note—See front of this volume for tables.)

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1. The procedures followed by the Department of the Interior in the initiation, prosecution, hearing and administrative decision of mining contests are in full compliance with the requirement of the Administrative Procedure Act, 5 U.S.C. § 554 (1970), as to separation of investigative or prosecuting functions from decision making, and such procedures do not deny due process----

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DECISIONS—Con. Page

any proceeding brought pursuant to section 109 of the Act (30 U.S.C. § 819) with respect to the occurrence of each violation alleged and as to each of the statutory criteria required by such section to be considered. Where such findings and conclusions are merely not labeled or mislabeled the Board will not normally remand; however, where these requisites are obfuscated or absent, a remand may be necessary to permit proper administrative and judicial review----- 317

2. Where an Administrative Law Judge is confronted with a factual determination of the effect of the amount of the penalty on the ability of an operator to continue in business under section 109(a)(1) of the Act, and the record contains no evidence on that criterion, the Judge should apply the presumption of no adverse effect in making the necessary finding----- 317

HEARINGS

1. Where an Administrative Law Judge's decision contains a ruling, in a single sentence, on all of the proposed findings and conclusions submitted by a party to a hearing and the ruling on each finding and conclusion is clear, there is no requirement that the Judge rule sep-

ADMINISTRATIVE PROCEDURE—Con.
HEARINGS—Con.

- | | |
|--|----------|
| arately as to each of the proposed findings and conclusions----- | Page 325 |
| 2. Exhibits and oral testimony in an administrative hearing are not fungibles where evidentiary value is ascribed on a quantum basis. Instead, they are products having different probative values dependent upon factors such as relevance, competency and credibility----- | 442 |
| 3. A coal prospecting permittee who applies for a coal lease, alleging with supportive data that there is coal in commercial quantities within certain lands in his permit, is entitled to a hearing conducted in accordance with the Administrative Procedure Act, 5 U.S.C. §554 (1970), before his application may be rejected because he has not shown coal in commercial quantities----- | 624 |
| 4. Under the Administrative Procedure Act, hearsay evidence is admissible at a hearing if it is relevant, material and not unduly repetitious, but it has little or no weight where the circumstances do not establish its reliability-- | 777 |

LICENSING

1. Under the Administrative Procedure Act, if a licensee has made a timely and sufficient application for a renewal of a license in accordance with agency rules, a license with reference to an activity of a continu-

ADMINISTRATIVE PROCEDURE—Con.
LICENSING—Continued

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|---|----------|
| ing nature does not expire until the application has been finally determined by the agency. This includes applications for grazing licenses and permits under the Taylor Grazing Act----- | Page 777 |
| 2. A proposed decision of a District Manager which includes a Notice of Advisory Board Adverse Recommendation becomes the final decision of the Department of the Interior on a grazing license application if no appeal is taken in the time permitted by Departmental regulations-- | 777 |
| 3. In accordance with regulation 43 CFR 4115.2-1(e) (9) (i), where the evidence establishes that no application for a grazing license was filed for two consecutive years, the base property qualifications for grazing privileges in an allotment are properly found to be lost----- | 777 |

ALASKA
HEADQUARTERS SITES

1. An application for a headquarters site for a commercial fishing operation must be rejected where the applicant fails to show that he is using the site in connection with a productive industry as required by law at the time he filed his application to purchase. The term "productive industry" is not so broad as to include within its meaning an operation

ALASKA—Con.

HEADQUARTERS SITES—Con.

such as the applicant's endeavor, where the applicant admits that he was actively engaged in fishing operations for only the first season after the claim was initiated, the gross receipts from the operation were meager, and the enterprise was discontinued and the boat sold-----

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215

HOMESTEADS

1. A homestead settlement claim for an additional homestead entry under the Act of April 28, 1904 (33 Stat. 527), 43 U.S.C. § 213, may be made for unsurveyed lands in Alaska by a person otherwise qualified who has filed an application for homestead entry on a form approved by the Director, Bureau of Land Management, and made acceptable final proof on his original homestead settlement claim, where the combined area of the two claims does not exceed 160 acres-----

269

INDIAN AND NATIVE AFFAIRS

1. Historical differences between the situation in Alaska and the other states afford reasons for different interpretations of legislation pertaining to Alaska natives and legislation pertaining to Indians in the other states. Therefore section 8 of the Act of May 17, 1884, regarding the occupancy of Alaska natives and others upon public land, is not *in pari materia* with the dis-

ALASKA—Con.

INDIAN AND NATIVE AFFAIRS—Con.

Page

claimer provision in section 3 of the Utah Enabling Act of 1894, as to lands "owned or held by any Indian or Indian Tribes"-----

443

APPLICATIONS AND ENTRIES

GENERALLY

1. A Bureau of Land Management decision which rejected an application under the Act of March 3, 1891, for a pumping station and irrigation system within a small cove of a reservoir withdrawn for a fish and wildlife management area pursuant to the Fish and Wildlife Coordination Act, will be sustained where it was made in due regard for the public interest in managing the area in light of that Act-----

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COAL LEASES AND PERMITS

GENERALLY

1. The holder of a coal prospecting permit is entitled to a lease pursuant to section 2 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 201 (b) (1970), if he shows to the satisfaction of the Secretary of the Interior that the land contains coal in commercial quantities discovered prior to the expiration of his permit-----
2. A coal prospecting permittee who applies for a coal lease, alleging with supportive data that there is coal in commercial quantities within certain lands in his permit, is entitled

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COAL LEASES AND PERMITS—Con.

GENERALLY—Con.

Page

to a hearing conducted in accordance with the Administrative Procedure Act, 5 U.S.C. § 554 (1970), before his application may be rejected because he has not shown coal in commercial quantities-----

624

LEASES

1. The holder of a coal prospecting permit is entitled to a lease pursuant to section 2 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 201 (b) (1970), if he shows to the satisfaction of the Secretary of the Interior that the land contains coal in commercial quantities discovered prior to the expiration of his permit-----

624

2. A coal prospecting permittee who applies for a coal lease, alleging with supportive data that there is coal in commercial quantities within certain lands in his permit, is entitled to a hearing conducted in accordance with the Administrative Procedure Act, 5 U.S.C. § 554 (1970), before his application may be rejected because he has not shown coal in commercial quantities-----

624

PERMITS

1. In determining whether lands are of such character as to subject them to leasing rather than prospecting under permits, the Secretary of the Interior is entitled to rely upon the

COAL LEASES AND PERMITS—Con.

PERMITS—Con.

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reasoned opinion of his technical expert, the Geological Survey. Only upon a clear showing that the Survey's determination was improperly made, will the Secretary act to disturb the determination-----

8

2. The holder of a coal prospecting permit is entitled to a lease pursuant to section 2 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 201(b) (1970), if he shows to the satisfaction of the Secretary of the Interior that the land contains coal in commercial quantities discovered prior to the expiration of his permit-----

624

2. A coal prospecting permittee who applies for a coal lease, alleging with supportive data that there is coal in commercial quantities within certain lands in his permit, is entitled to a hearing conducted in accordance with the Administrative Procedure Act, 5 U.S.C. § 554 (1970), before his application may be rejected because he has not shown coal in commercial quantities-----

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Workability

1. The workability of any coal will ultimately be determined by two offsetting factors—(1) its character and heat-giving quality, whence comes its value, and (2) its accessibility, quantity, thick-

**COAL LEASES AND PERMITS—Con.
PERMITS—Con.**

Workability—Con.

Page

ness, depth, and other conditions that affect the cost of its extraction. It must be considered a workable coal if its value, as determined by its character and heat-giving quality, exceeds the cost of extraction-----

7

2. Workability as defined by the USGS is concerned with the economics of the intrinsic factors. Extrinsic factors such as transportation, markets, etc., are not considered. However, the cost of mining must be considered. In its classification of coal lands, USGS has anticipated and assumed the ultimate coming of conditions favorable for mining and marketing of any coal if the coal is workable in terms of the intrinsic factors. In this respect, the test of workability under the Mineral Leasing Act differs from the prudent man rule under the mining laws-----

8

3. Although workability is basically a problem of the physical parameters of the coal, the test of workability is dependent upon economic factors. If the value of the coal is greater than the cost of its extraction, the deposit is workable-----

8

4. Workability may be established by geologic inference where detailed information is available regarding the existence of a workable deposit in adjacent lands and there are geologic and other surround-

**COAL LEASES AND PERMITS—Con.
PERMITS—Con.**

Workability—Con.

Page

ing conditions from which the workability of the deposit can be reasonably inferred. However, geologic inference, as a tool for determining workability, has certain limitations. The mere fact that lands applied for adjoin other lands which contain workable coal deposits does not, per se, permit the inference that they contain coal deposits in workable quality and quantity-----

8

COLOR OR CLAIM OF TITLE

GENERALLY

1. Under the Color of Title Act, 45 Stat. 1069 (1928), as amended, 43 U.S.C. § 1068 (1970), an applicant's period of adverse possession may commence at a time when title to the land is being held by a state pursuant to the provisions of the Carey Act, 28 Stat. 422 (1894), as amended, 43 U.S.C. §§ 641 *et seq.* (1970)-----

209

2. The period of possession of a color of title claim, having been initiated when the land was subject to appropriation under the public land laws, is not interrupted by a subsequent period of time during which the land was not open for appropriation-----

210

3. A color of title application cannot be allowed where the applicant fails to show that the land applied for is public land, *i.e.*, land subject to the operation of the public land laws---

702

COLOR OR CLAIM OF TITLES—Con.**GENERALLY—Con.****Page**

4. The term "public land," as used in the Color of Title Act, 43 U.S.C. §1068 (1970), does not include land purchase by the Government. That term does not include land which has been set aside by Executive Order for the benefit of the Indians-----

702

APPLICATIONS

1. A color of title application embracing land occupied by one purportedly claiming under color of title, but who does not establish that the land in issue was conveyed to him by an instrument which, on its face, purported to convey the land in issue, is not allowable, since color or claim of title is not demonstrated-----

702

CONSTITUTIONAL LAW

1. A mining claimant is not denied due process merely because of prehearing publicity where he fails to show that there was any unfairness in the contest proceeding itself-----

325

CONTRACTS*(See also Rules of Practice.)***GENERALLY**

1. Remedies for alleged breach of a private agreement between parties who have conflicting grazing lease applications must be sought in the courts, not in the Department of the Interior, which has no jurisdiction over such matters-----

698

CONTRACTS—Con.**CONSTRUCTION AND OPERATION****Actions of Parties****Page**

1. Where the contractor's interpretation of an arguably ambiguous construction contract provision governing variations in internal pipe diameters would largely nullify a limitation on the length of the pipe over which the maximum internal variation of the pipe could extend and where the contractor did not protest the Government's interpretation, but took actions which were only consistent with agreement to or acquiescence in the Government's interpretation, the Board holds that a disagreement with the Government's interpretation first expressed over three months after a problem with internal pipe diameters was brought to the contractor's attention by the rejection of a substantial quantity of pipes was untimely and the contractor's claim for a constructive change based on misinterpretation of the contract was denied-----

29

2. Where a contract provision prescribed a method for the repair of airholes in gasket bearing areas of concrete pipe and provided that "All other repairs shall be made in accordance with the procedures of Chapter VII of the Sixth Edition of the

CONTRACTS—Con.

CONSTRUCTION AND OPERATION—Con.

Actions of Parties—Con.

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Bureau of Reclamation Concrete Manual," and the Concrete Manual, in addition to prescribing methods of repair, listed nine defects which were normally repairable and where the evidence established that during contract performance the parties considered the Concrete Manual to control not only methods of repair but also the types of repairable defects, repair of the listed defects was permissible notwithstanding that the contract reference was to "procedures" of the Concrete Manual and the Government's contention that under the dictionary "procedures" and "methods" have the same meaning.....

29

3. The Board denies a construction contractor's claim for the cost of constructing a dike which was not a contract requirement where it finds: (i) that the dike was constructed of excess material from a sewage lagoon, excavation of which was a contract requirement; (ii) a reasonable construction of the contract would permit the contracting officer to direct the placement of excess material from the lagoon at any place within one-half mile of the site and no part of the dike was in excess of one-half mile from the site; (iii) construction of the dike

CONTRACTS—Con.

CONSTRUCTION AND OPERATION—Con.

Actions of Parties—Con.

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was not ordered or approved by anyone having authority to commit the Government; and (iv) the contractor failed to protest to the contracting officer when the alleged extra work was performed.....

280

4. A contractor's claim for the cost of repairing a lagoon which was allegedly damaged because a dike not required by the contract channeled floodwaters from a rainstorm into the lagoon was denied where the evidence did not establish Government responsibility for the existence of the dike, a portion of the damage was attributable to an open sewer trench which was the contractor's responsibility and the evidence did not establish that the dike was a principal causative factor in flood damage to the lagoon. Under the Permits and Responsibilities clause (Article 12 of Standard Form 23-A, June 1964 Edition), the contractor is responsible for the work until completion and final acceptance.....

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Allowable Costs

1. Where a contractor under a cost-plus-fixed-fee contract gave notice of an impending overrun but proceeded with performance without being advised that additional funds had been provided

CONTRACTS—Con.**CONSTRUCTION AND OPERATION—Con.****Allowable Costs—Con.**

as specified in the Limitation of Cost Clause in circumstances where the evidence did not establish that the contractor was directed or induced to continue performance, that there was any understanding that additional funds would be provided, or that a change to the contract had occurred, the contractor's claim for overrun is denied on the grounds that the contractor had proceeded with performance at his own risk and that whether additional funds would be provided was within the discretion of the contracting officer-----

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734

Changed Conditions (Differing Site Conditions)

1. Where a contract for the construction of a road provided for the placement of underdrain, estimated at 3000 linear feet, a claim by a contractor under the Changed Conditions clause upon encountering water seepage, which necessitated less than 3000 linear feet of underdrain to be placed, was denied, since the presence of a wet condition should have been reasonably anticipated from a study of the contractual documents and the amount of wetness encountered was actually less than the contractor might have expected -----

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CONTRACTS—Con.**CONSTRUCTION AND OPERATION—Con.****Changed Conditions (Differing Site Conditions)—Con.**

Page

2. Quantities of rock encountered by a road construction contractor materially in excess of what should have been anticipated from the contract plans together with the absence of suitable material in situ or from borrow for finishing the road to satisfy Government requirements is found to constitute a Category 1 Changed Condition where the contract documents taken as a whole and construed in the light of the evidence of record indicated that conditions would be more favorable than those actually experienced in construction-----

667

Changes and Extras

1. Where the contractor's interpretation of an arguably ambiguous construction contract provision governing variations in internal pipe diameters would largely nullify a limitation on the length of the pipe over which the maximum internal variation of the pipe could extend and where the contractor did not protest the Government's interpretation, but took actions which were only consistent with agreement to or acquiescence in the Government's interpretation, the Board holds that a disagreement with the

CONTRACTS—Con.**CONSTRUCTION AND OPERATION—Con.****Changes and Extras—Con.**

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Government's interpretation first expressed over three months after a problem with internal pipe diameters was brought to the contractor's attention by the rejection of a substantial quantity of pipes was untimely and the contractor's claim for a constructive change based on misinterpretation of the contract was denied.

29

2. Where the Board found that the contracts contemplated that repair of listed defects in accordance with the Concrete Manual was permissible and the Concrete Manual contained a provision providing that "repairs should not be permitted when the imperfections or damage are the result of a continuing failure to take known corrective action," the Board rules that a reasonable interpretation of the quoted provision would permit the denial of otherwise allowable repairs if the defects or damage were attributable to the contractor's continued or prolonged failure to implement measures which the contractor either knows or as a reasonably skilled contractor should know would eliminate or alleviate the defects. The evidence having established the cause of a particular defect and that the defect occurred in significant numbers of

CONTRACTS—Con.**CONSTRUCTION AND OPERATION—Con.****Changes and Extras—Con.**

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pipes over a substantial period of time, the refusal to permit such defects to be repaired did not constitute a change to the contract. The Government's refusal to permit certain other repairs which the evidence established was based on concern for the integrity of any repair generally rather than the contractor's continuing failure to take known corrective action did constitute a change to the contract.

29

3. Where the Concrete Manual placed limitations on the repairable area of certain defects and did not limit the repairable area of certain other defects but the evidence established that all such defects were not repairable without regard to magnitude and extent, and the evidence established that repairs normally permitted by the Concrete Manual were not allowed, but evidence of the extent of defects on rejected pipes was lacking, the Board holds that the contractor has failed to carry its burden of proof that pipes were improperly rejected. As to identified pipes which appellant's expert witness testified were repairable in accordance with the Concrete Manual, the Board holds that appellant has established prima facie that the pipes were improperly rejected.

30

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Page

4. Where the Government refused to allow repairs to certain defects permitted by the Concrete Manual prior to conducting hydrostatic tests on the pipes and it appeared that at least some of the pipes would have passed the test and been acceptable if repairs in accordance with the Concrete Manual had been allowed, the Government by its actions has made the evidence unavailable and the Board utilizes a "jury verdict" approach to determine the number of pipes which could have been repaired under the Concrete Manual and made acceptable.....

30

5. Where the Government required hydrostatic tests of pipes in excess of those specified by the contracts, the Board rules that the contractor's entitlement to compensation for such tests could properly turn on the results of the tests inasmuch as the Inspection and Acceptance Clause of the General Provisions (Standard Form 23-A, April 1961 Edition) allows the Government at any time before final acceptance of the entire work to request the removal of completed work at the contractor's expense if the work does not conform to contract requirements and for an equitable adjustment to the contractor if the work

CONTRACTS—Con.**CONSTRUCTION AND OPERATION—Con.****Changes and Extras—Con.**

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- does conform to the contract.....
6. Where the evidence failed to support the contractor's claim as to the amount of extra repair work and testing required by the Government and the quantity of pipe which was improperly rejected and there was substantial evidence that the contractor had underbid the work and that a significant portion of the contractor's costs in addition to its estimates was due to factors such as unproven or unsuitable machinery and equipment, improper maintenance and inexperienced and unskilled labor, justification for the total cost method of computing an equitable adjustment has not been established. The Board holds that the equitable adjustment due the contractor may properly be computed on the basis of summaries of costs from appellant's books and records, overruling a Government objection to such cost presentation made for the first time on brief that the books and records from which the summaries were prepared were not available at the hearing, since the record revealed that appellant had repeatedly offered to make its records available for audit by the Government prior to the hearing.....
7. The Board denied the Government's motions to dis-

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miss as beyond the jurisdiction of the Board, the contractor's claims to be compensated for inefficiency resulting from the interim wrongful rejection of substantial quantities of pipes and for reimbursement of a sum paid to its subcontractor because of the unavailability of pipe for laying which was allegedly attributable to the Government's incorrect interpretation of the contract as to permissible internal diameters of the pipe. On the merits the latter claim was denied, since Government responsibility for this payment had not been established.....

31

8. A Government motion to dismiss as beyond the jurisdiction of the Board a claim arising out of severe and arbitrary inspection was denied, the Board holding that such a claim was not readily distinguishable from claims based upon the imposition of excessive standards of workmanship which claims are clearly cognizable by the Board as constructive changes. A contractor's claim for lost profits in such circumstances was dismissed as beyond the jurisdiction of the Board since the concept of an equitable adjustment excludes anticipated or unearned profits on work not accomplished.....

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9. A contractor's claim for interest as part of an equitable adjustment was denied where there was no evidence of specific loan transactions or of payments of interest in the record.....

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10. Where a supply contract which provided for the delivery and installation of a television antenna system did not contain a "Suspension of the Work" or other "pay for delay" clause and the Government issued a modification postponing the delivery date because the building in which the system was to be installed had not been completed, the Board dismissed as beyond its jurisdiction the contractor's claim for costs incurred in maintaining a crew in readiness to perform the installation inasmuch as the postponement of the delivery date was not a change within the meaning of the "Changes" clause.....

245

11. Where the contract obligated the Government to provide borrow sources where sufficient quantities of suitable material were not available from roadway excavation as planned and where the Government did not comply with this obligation when the condition was called to its attention, the Board holds that directives which required the con-

CONTRACTS—Con.**CONSTRUCTION AND OPERATION—Con.****Changes and Extras—Con. Page**

tractor to "scrounge around" for borrow and to rearrange the available material constituted a constructive change.----- 667

12. A contractor's claim for the cost of repairing a lagoon which was allegedly damaged because a dike not required by the contract channeled floodwaters from a rain-storm into the lagoon was denied where the evidence did not establish Government responsibility for the existence of the dike, a portion of the damage was attributable to an open sewer trench which was the contractor's responsibility and the evidence did not establish that the dike was a principal causative factor in flood damage to the lagoon. Under the Permits and Responsibilities clause (Article 12 of Standard Form 23-A, June 1964 Edition), the contractor is responsible for the work until completion and final acceptance.----- 280

Construction Against Drafter

1. Where a contractor's interpretation of the amount of access road improvement for which payment would be made under a contract for the construction of a power line was determined to be reasonable and, based upon a site investigation, the contractor had reason to suspect that

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the Government's estimate of the amount of access road was substantially understated, but the Government withheld the specific list of access roads which prior to the issuance of the invitation it had determined were necessary for its needs and for which payment would be made, the Board holds that the Government's failure to disclose material information in its possession prior to bid overcame the consequences normally attributable to a bidder who fails to make inquiry concerning an apparent conflict between the estimated quantity and the results of the site investigation.----- 753

2. Quantities of rock encountered by a road construction contractor materially in excess of what should have been anticipated from the contract plans together with the absence of suitable material in situ or from borrow for finishing the road to satisfy Government requirements is found to constitute a Category 1 Changed Condition where the contract documents taken as a whole and construed in the light of the evidence of record indicated that conditions would be more favorable than those actually experienced in construction. 667

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CONSTRUCTION AND OPERA-
TION—Con.**

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**Differing Site Conditions
(Changed Conditions)**

1. Quantities of rock encountered by a road construction contractor materially in excess of what should have been anticipated from the contract plans together with the absence of suitable material in situ or from borrow for finishing the road to satisfy Government requirements is found to constitute a Category I Changed Condition where the contract documents taken as a whole and construed in the light of the evidence of record indicated that conditions would be more favorable than those actually experienced in construction-----

667

Drawings and Specifications

2. Where the Board found that the contracts contemplated that repair of listed defects in accordance with the Concrete Manual was permissible and the Concrete Manual contained a provision providing that "repairs should not be permitted when the imperfections or damage are the result of a continuing failure to take known corrective action," the Board rules that a reasonable interpretation of the quoted provision would permit the denial of otherwise allowable repairs if the defects or damage were at-

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TION—Con.**

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tributable to the contractor's continued or prolonged failure to implement measures which the contractor either knows or as a reasonably skilled contractor should know would eliminate or alleviate the defects. The evidence having established the cause of a particular defect and that the defect occurred in significant numbers of pipes over a substantial period of time, the refusal to permit such defects to be repaired did not constitute a change to the contract. The Government's refusal to permit certain other repairs which the evidence established was based on concern for the integrity of any repair generally rather than the contractor's continuing failure to take known corrective action did constitute a change to the contract-----

29

2. The Board denies a construction contractor's claim for the cost of constructing a dike which was not a contract requirement where it finds: (i) that the dike was constructed of excess material from a sewage lagoon, excavation of which was a contract requirement; (ii) a reasonable construction of the contract would permit the contracting officer to direct the placement of excess material from the lagoon at any place with-

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in one-half mile of the site and no part of the dike was in excess of one-half mile from the site; (iii) construction of the dike was not ordered or approved by anyone having authority to commit the Government; and (iv) the contractor failed to protest to the contracting officer when the alleged extra work was performed.....

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3. While Federal custom ordinarily prevails over local usage when in conflict, in resolving a dispute concerning the reasonableness of tolerances permitted under a contract for the construction of a road, state and not Federal custom is held to govern, since the evidence showed state usage to be standardized and the Federal trade practice was not clearly established.....

345

4. Where a contract for the construction of a road provided for the placement of underdrain, estimated at 3000 linear feet, a claim by a contractor under the Changed Conditions clause upon encountering water seepage, which necessitated less than 3000 linear feet of underdrain to be placed, was denied, since the presence of a wet condition should have been reasonably anticipated from a study of the contractual documents and

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the amount of wetness encountered was actually less than the contractor might have expected....

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5. Quantities of rock encountered by a road construction contractor materially in excess of what should have been anticipated from the contract plans together with the absence of suitable material in situ or from borrow for finishing the road to satisfy Government requirements is found to constitute a Category 1 Changed Condition where the contract documents taken as a whole and construed in the light of the evidence of record indicated that conditions would be more favorable than those actually experienced in construction.....

667

6. Where the contract obligated the Government to provide borrow sources where sufficient quantities of suitable materials were not available from roadway excavation as planned and where the Government did not comply with this obligation when the condition was called to its attention, the Board holds that directives which required the contractor to "scrounge around" for borrow and to rearrange the available material constituted a constructive change.....

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7. Where a contractor's interpretation of the amount

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CONSTRUCTION AND OPERATION—Con.

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of access road improvement for which payment would be made under a contract for the construction of a power line was determined to be reasonable and, based upon a site investigation, the contractor had reason to suspect that the Government's estimate of the amount of access road was substantially understated, but the Government withheld the specific list of access roads which prior to the issuance of the invitation it had determined were necessary for its needs and for which payment would be made, the Board holds that the Government's failure to disclose material information in its possession prior to bid overcame the consequences normally attributable to a bidder who fails to make inquiry concerning an apparent conflict between the estimated quantity and the results of the site investigation.

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Estimated Quantities

1. Quantities of rock encountered by a road construction contractor materially in excess of what should have been anticipated from the contract plans together with the absence of suitable material in situ or from borrow for finishing the road to satisfy Government re-

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Estimated Quantities—Con.

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quirements is found to constitute a Category 1 Changed Condition where the contract documents taken as a whole and construed in the light of the evidence of record indicated that conditions would be more favorable than those actually experienced in construction.

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2. Where a contractor's interpretation of the amount of access road improvement for which payment would be made under a contract for the construction of a power line was determined to be reasonable and, based upon a site investigation, the contractor had reason to suspect that the Government's estimate of the amount of access road was substantially understated, but the Government withheld the specific list of access roads which prior to the issuance of the invitation it had determined were necessary for its needs and for which payment would be made, the Board holds that the Government's failure to disclose material information in its possession prior to bid overcame the consequences normally attributable to a bidder who fails to make inquiry concerning an apparent conflict between the estimated quantity and the results of the site investigation.

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TION—Con.General Rules of Construc-
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1. Where the contractor's interpretation of an arguably ambiguous construction contract provision governing variations in internal pipe diameters would largely nullify a limitation on the length of the pipe over which the maximum internal variation of the pipe could extend and where the contractor did not protest the Government's interpretation, but took actions which were only consistent with agreement to or acquiescence in the Government's interpretation, the Board holds that a disagreement with the Government's interpretation first expressed over three months after a problem with internal pipe diameters was brought to the contractor's attention by the rejection of a substantial quantity of pipes was untimely and the contractor's claim for a constructive change based on misinterpretation of the contract was denied. 29
2. Where a contract provision prescribed a method for the repair of airholes in gasket bearing areas of concrete pipe and provided that "All other repairs shall be made in accordance with the procedures of Chapter VII of the Sixth Edition of the Bureau of Reclamation Concrete Manual," and

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TION—Con.General Rules of Construc-
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- the Concrete Manual, in addition to prescribing methods of repair, listed nine defects which were normally repairable and where the evidence established that during contract performance the parties considered the Concrete Manual to control not only methods of repair but also the types of repairable defects, repair of the listed defects was permissible notwithstanding that the contract reference was to "procedures" of the Concrete Manual and the Government's contention that under the dictionary "procedures" and "methods" have the same meaning.----- 29
3. While Federal custom ordinarily prevails over local usage when in conflict, in resolving a dispute concerning the reasonableness of tolerances permitted under a contract for the construction of a road, state and not Federal custom is held to govern, since the evidence showed state usage to be standardized and the Federal trade practice was not clearly established.----- 345
4. Where the Government is obligated to "compensate" the contractor for restoring damaged work under a contract provision entitled "Contractor's Responsibility for Work," the word

**CONTRACTS—Con.
CONSTRUCTION AND OPERA-
TION—Con.**

**General Rules of Construc-
tion—Con.**

"compensate" is consid-
ered to have a different
and more limited mean-
ing than the words
"equitable adjustment"
used in other provisions
of the contract-----

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Intent of Parties

1. Where the Board found that the contracts contemplated that repair of listed defects in accordance with the Concrete Manual was permissible and the Concrete Manual contained a provision providing that "repairs should not be permitted when the imperfections or damage are the result of a continuing failure to take known corrective action," the Board rules that a reasonable interpretation of the quoted provision would permit the denial of otherwise allowable repairs if the defects or damage were attributable to the contractor's continued or prolonged failure to implement measures which the contractor either knows or as a reasonably skilled contractor should know would eliminate or alleviate the defects. The evidence having established the cause of a particular defect and that the defect occurred in significant numbers of pipes over a substantial period of time, the refusal to permit such defects to be repaired did not constitute a change to the

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TION—Con.**

Intent of Parties—Con.

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contract. The Govern-
ment's refusal to permit
certain other repairs
which the evidence
established was based on
concern for the integrity
of any repair generally
rather than the contrac-
tor's continuing failure to
take known corrective
action did constitute a
change to the contract---

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Modification of Contracts

1. A construction contractor's claim for an equitable adjustment is denied where the evidence shows that payment for the overlay work involved in repairing eroded pavement was provided for in an accepted change order and the appellant failed to sustain its burden of showing that the straitened financial circumstances in which the contractor was in at the time of the change order was the result of wrongful action by the contracting officer or other Government personnel administering the contract under which the claim of duress was asserted-----

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Warranties

1. Under the Standard Form Supply Contract Default clause, a termination for default, following acceptance, of a contract for the purchase of a scanning electron microscope on the grounds it was defective, latently, and by virtue of various

CONTRACTS—Con.**CONSTRUCTION AND OPERATION—Con.****Warranties—Con.**

breaches of warranty, was improper in the absence of a notice preceding the termination affording the contractor at least ten days within which to cure the defects, and was, accordingly, treated as a termination for the convenience of the Government.

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DISPUTES AND REMEDIES**Burden of Proof**

1. Where the Concrete Manual placed limitations on the repairable area of certain defects and did not limit the repairable area of certain other defects but the evidence established that all such defects were not repairable without regard to magnitude and extent, and the evidence established that repairs normally permitted by the Concrete Manual were not allowed, but evidence of the extent of defects on rejected pipes was lacking, the Board holds that the contractor has failed to carry its burden of proof that pipes were improperly rejected. As to identified pipes which appellant's expert witness testified were repairable in accordance with the Concrete Manual, the Board holds that appellant has established prima facie that the pipes were improperly rejected.
2. Where substantial quantities of pipes which had been accepted were rejected on

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CONTRACTS—Con.**DISPUTES AND REMEDIES—Con.****Burden of Proof—Con.**

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a subsequent inspection, and the evidence did not establish that the pipes did not conform to contract requirements, the subsequent rejection of the pipes was improper even though the initial acceptance was not the final acceptance contemplated by the contract and even though it is a general rule that the burden is on the seller to prove that goods rejected prior to acceptance conform to contract requirements. The Board holds that the initial acceptance, in the absence of evidence to the contrary, established that the pipes conformed to the requirements of the contract.

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3. Where the Government refused to allow repairs to certain defects permitted by the Concrete Manual prior to conducting hydrostatic tests on the pipes and it appeared that at least some of the pipes would have passed the test and been acceptable if repairs in accordance with the Concrete Manual had been allowed, the Government by its actions has made the evidence unavailable and the Board utilizes a "jury verdict" approach to determine the number of pipes which could have been repaired under the Concrete Manual and made acceptable.

30

CONTRACTS—Con.**DISPUTES AND REMEDIES—Con.****Burden of Proof—Con.**

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4. A construction contractor's claim for an equitable adjustment is denied where the evidence shows that payment for the overlay work involved in repairing eroded pavement was provided for in an accepted change order and the appellant failed to sustain its burden of showing that the straitened financial circumstances in which the contractor was in at the time of the change order was the result of wrongful action by the contracting officer or other Government personnel administering the contract under which the claim of duress was asserted.-----

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5. A contractor's claim for the cost of repairing a lagoon which was allegedly damaged because a dike not required by the contract channeled floodwaters from a rainstorm into the lagoon was denied where the evidence did not establish Government responsibility for the existence of the dike, a portion of the damage was attributable to an open sewer trench which was the contractor's responsibility and the evidence did not establish that the dike was a principal causative factor in flood damage to the lagoon. Under the Permits and Responsibilities clause (Article 12 of Standard Form 23-A, June 1964

CONTRACTS—Con.**DISPUTES AND REMEDIES—Con.****Burden of Proof—Con.**

Page

- Edition), the contractor is responsible for the work until completion and final acceptance.-----
6. Expert testimony giving estimates of what would be the cost for a reasonable contractor to restore damage to a road project and to finish the roadway is not accepted where the testimony is unclear and ambiguous respecting the applicable time period, whether all elements of costs and profit are included, and whether the task being estimated was comprehended by the expert.-----
7. Where a contractor under a cost-plus-fixed-fee contract gave notice of an impending overrun but proceeded with performance without being advised that additional funds had been provided as specified in the Limitation of Cost Clause in circumstances where the evidence did not establish that the contractor was directed or induced to continue performance, that there was any understanding that additional funds would be provided, or that a change to the contract had occurred, the contractor's claim for overrun is denied on the grounds that the contractor had proceeded with performance at his own risk and that whether additional funds would be provided was within the

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CONTRACTS—Con.**DISPUTES AND REMEDIES—Con.****Burden of Proof—Con.**

discretion of the contracting officer..... Page
734

Damages**Generally**

1. Where the Government is obligated to "compensate" the contractor for restoring damaged work under a contract provision entitled "Contractor's Responsibility for Work," the word "compensate" is considered to have a different and more limited meaning than the words "equitable adjustment" used in other provisions of the contract..... 559

Actual Damages

1. Where the Government is obligated to compensate the contractor for restoration of damaged work under a contract for road construction and actual costs are in evidence, the contractor's entitlement to compensation is based on recorded actual costs. 558

Liquidated Damages

1. The Board denies a Government motion for reconsideration where it finds that a diary entry contained in an exhibit offered in evidence by the Government, together with the testimony of a witness for the appellant created an inference that the Government was responsible for an indeterminate portion of a protracted delay in removing utility poles from the work area on a

CONTRACTS—Con.**DISPUTES AND REMEDIES—Con.****Damages—Con.****Liquidated Damages—Con.**

road construction job and that the Government failed to rebut such inference even though information having a direct bearing on the propriety of liquidated damages assessed for delayed performance was apparently within its possession or was more accessible to it than it was to the appellant. The Board therefore reaffirmed its prior holdings that no attempt should be made to apportion the delay between the parties and that the contract time should be extended to the date the contract was determined to be substantially complete.. Page
235

Measurement

1. Expert testimony giving estimates of what would be the cost for a reasonable contractor to restore damage to a road project and to finish the roadway is not accepted where the testimony is unclear and ambiguous respecting the applicable time period, whether all elements of costs and profit are included, and whether the task being estimated was comprehended by the expert..... 558.

Equitable Adjustments

1. Where the Government required hydrostatic tests of pipes in excess of those specified by the contracts, the Board rules that the contractor's entitlement to compensation for such

CONTRACTS—Con.**DISPUTES AND REMEDIES—Con.****Equitable Adjustments—Con.**

tests could properly turn on the results of the tests inasmuch as the Inspection and Acceptance Clause of the General Provisions (Standard Form 23-A, April 1961 Edition) allows the Government at any time before final acceptance of the entire work to request the removal of completed work at the contractor's expense if the work does not conform to contract requirements and for an equitable adjustment to the contractor if the work does conform to the contract.

Page

2. Where the evidence failed to support the contractor's claim as to the amount of extra repair work and testing required by the Government and the quantity of pipe which was improperly rejected and there was substantial evidence that the contractor had underbid the work and that a significant portion of the contractor's costs in addition to its estimates was due to factors such as unproven or unsuitable machinery and equipment, improper maintenance and inexperienced and unskilled labor, justification for the total cost method of computing an equitable adjustment has not been established. The Board holds that the equitable adjustment due the contractor may prop-

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CONTRACTS—Con.**DISPUTES AND REMEDIES—Con.****Equitable Adjustments—Con.**

erly be computed on the basis of summaries of costs from appellant's books and records, overruling a Government objection to such cost presentation made for the first time on brief that the books and records from which the summaries were prepared were not available at the hearing, since the record revealed that appellant had repeatedly offered to make its records available for audit by the Government prior to the hearing.

Page

3. A contractor's claim for interest as part of an equitable adjustment was denied where there was no evidence of specific loan transactions or of payments of interest in the record.
4. Where the Government is obligated to "compensate" the contractor for restoring damaged work under a contract provision entitled "Contractor's Responsibility for Work," the word "compensate" is considered to have a different and more limited meaning than the words "equitable adjustment" used in other provisions of the contract.

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Jurisdiction

1. The Board denied the Government's motions to dismiss as beyond the jurisdiction of the Board, the contractor's claims to be compensated for inefficiency resulting from the

CONTRACTS—Con.

DISPUTES AND REMEDIES—Con.

Jurisdiction—Con.

Page

interim wrongful rejection of substantial quantities of pipes and for reimbursement of a sum paid to its subcontractor because of the unavailability of pipe for laying which was allegedly attributable to the Government's incorrect interpretation of the contract as to permissible internal diameters of the pipe. On the merits the latter claim was denied, since Government responsibility for this payment had not been established.....

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2. A Government motion to dismiss as beyond the jurisdiction of the Board a claim arising out of severe and arbitrary inspection was denied, the Board holding that such a claim was not readily distinguishable from claims based upon the imposition of excessive standards of workmanship which claims are clearly cognizable by the Board as constructive changes. A contractor's claim for lost profits in such circumstances was dismissed as beyond the jurisdiction of the Board since the concept of an equitable adjustment excludes anticipated or unearned profits on work not accomplished.....
3. Where a supply contract which provided for the delivery and installation of a television antenna system did not contain a

31

CONTRACTS—Con.

DISPUTES AND REMEDIES—Con.

Jurisdiction—Con.

Page

"Suspension of the Work" or other "pay for delay" clause and the Government issued a modification postponing the delivery date because the building in which the system was to be installed had not been completed, the Board dismissed as beyond its jurisdiction the contractor's claim for costs incurred in maintaining a crew in readiness to perform the installation inasmuch as the postponement of the delivery date was not a change within the meaning of the "Changes" clause.....

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Substantial Evidence

1. Expert testimony giving estimates of what would be the cost for a reasonable contractor to restore damage to a road project and to finish the roadway is not accepted where the testimony is unclear and ambiguous respecting the applicable time period, whether all elements of costs and profit are included, and whether the task being estimated was comprehended by the expert.....

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Termination for Convenience

1. Under the Standard Form Supply Contract Default clause, a termination for default, following acceptance, of a contract for the purchase of a scan-

CONTRACTS—Con.

DISPUTES AND REMEDIES—Con.

Termination for Convenience—Con.

ning electron microscope on the grounds it was defective, latently, and by virtue of various breaches of warranty, was improper in the absence of a notice preceding the termination affording the contractor at least ten days within which to cure the defects, and was, accordingly, treated as a termination for the convenience of the Government.....

Page

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Termination for Default

1. Under the Standard Form Supply Contract Default clause, a termination for default, following acceptance, of a contract for the purchase of a scanning electron microscope on the grounds it was defective, latently, and by virtue of various breaches of warranty, was improper in the absence of a notice preceding the termination affording the contractor at least ten days within which to cure the defects, and was, accordingly, treated as a termination for the convenience of the Government.....

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FORMATION AND VALIDITY

Authority to Make

1. The Board denies a construction contractor's claim for the cost of constructing a dike which was not a contract requirement where it finds: (i) that the dike was constructed of excess material from a

CONTRACTS—Con.

FORMATION AND VALIDITY—Con.

Authority to Make—Con.

Page

sewage lagoon, excavation of which was a contract requirement; (ii) a reasonable construction of the contract would permit the contracting officer to direct the placement of excess material from the lagoon at any place within one-half mile of the site and no part of the dike was in excess of one-half mile from the site; (iii) construction of the dike was not ordered or approved by anyone having authority to commit the Government; and (iv) the contractor failed to protest to the contracting officer when the alleged extra work was performed.....

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Cost-Type Contracts

1. Where a contractor under a cost-plus-fixed-fee contract gave notice of an impending overrun but proceeded with performance without being advised that additional funds had been provided as specified in the Limitation of Cost Clause in circumstances where the evidence did not establish that the contractor was directed or induced to continued performance, that there was any understanding that additional funds would be provided, or that a change to the contract had occurred, the contractor's claim for overrun is denied on the grounds that the con-

CONTRACTS—Con.**FORMATION AND VALIDITY—Con.****Cost-Type Contracts—Con.**

tractor had proceeded
with performance at his
own risk and that whether
additional funds would be
provided was within the
discretion of the con-
tracting officer.----- Page
734

PERFORMANCE OR DEFAULT**Acceptance of Performance**

1. Where substantial quantities of pipes which had been accepted were rejected on a subsequent inspection, and the evidence did not establish that the pipes did not conform to contract requirements, the subsequent rejection of the pipes was improper even though the initial acceptance was not the final acceptance contemplated by the contract and even though it is a general rule that the burden is on the seller to prove that goods rejected prior to acceptance conform to contract requirements. The Board holds that the initial acceptance, in the absence of evidence to the contrary, established that the pipes conformed to the requirements of the contract.--- 30
2. Under the Standard Form Supply Contract Default clause, a termination for default, following acceptance, of a contract for the purchase of a scanning electron microscope on the grounds it was defective, latently, and by virtue of various breaches of warranty, was improper in the absence of a

CONTRACTS—Con.**PERFORMANCE OR DEFAULT—Con.****Acceptance of Performance—Con.**

notice preceding the termination affording the contractor at least ten days within which to cure the defects, and was, accordingly, treated as a termination for the convenience of the Government.----- Page
769

Excusable Delays

1. The Board denies a Government motion for reconsideration where it finds that a diary entry contained in an exhibit offered in evidence by the Government, together with the testimony of a witness for the appellant created an inference that the Government was responsible for an indeterminate portion of a protracted delay in removing utility poles from the work area on a road construction job and that the Government failed to rebut such inference even though information having a direct bearing on the propriety of liquidated damages assessed for delayed performance was apparently within its possession or was more accessible to it than it was to the appellant. The Board therefore reaffirmed its prior holdings that no attempt should be made to apportion the delay between the parties and that the contract time should be extended to the date the contract was determined to be substantially complete.----- 235

CONTRACTS—Con.

PERFORMANCE OR DEFAULT—Con.

Inspection

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1. Where substantial quantities of pipes which had been accepted were rejected on a subsequent inspection, and the evidence did not establish that the pipes did not conform to contract requirements, the subsequent rejection of the pipes was improper even though the initial acceptance was not the final acceptance contemplated by the contract, and even though it is a general rule that the burden is on the seller to prove that goods rejected prior to acceptance conform to contract requirements. The Board holds that the initial acceptance, in the absence of evidence to the contrary, established that the pipes conformed to the requirements of the contract.....

30

COURTS

1. Remedies for alleged breach of a private agreement between parties who have conflicting grazing lease applications must be sought in the courts, not in the Department of the Interior, which has no jurisdiction over such matters.....

698

DELEGATION OF AUTHORITY

GENERALLY

1. Upon request of the State Director, a District Manager, Bureau of Land Management, who has

DELEGATION OF AUTHORITY—Con.

GENERALLY—Con.

Page

authority to enter into timber sale contracts also has authority to terminate such contracts when to do so would be in the best interest of the Government.....

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FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969

GENERALLY

1. It is error for an Administrative Law Judge to fail to make appropriate findings of fact and conclusions of law and to show the reasons therefor in his decision in any proceeding brought pursuant to section 109 of the Act (30 U.S.C. § 819) with respect to the occurrence of each violation alleged and as to each of the statutory criteria required by such section to be considered. Where such findings and conclusions are merely not labeled or mislabeled the Board will not normally remand; however, where these requisites are obfuscated or absent, a remand may be necessary to permit proper administrative and judicial review.....

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ADMINISTRATIVE PROCEDURE

Generally

1. The Board may be persuaded by the findings of fact in an arbitration proceeding where they are made a part of the record, but the Board is not bound or controlled thereby.....

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**FEDERAL COAL MINE HEALTH
AND SAFETY ACT OF 1969—Con.
ADMINISTRATIVE PROCEDURE—Con.**

Hearings

Order of Proof

- | | |
|---|------|
| | Page |
| 1. Section 556(c)(5) of the Administrative Procedure Act grants wide latitude to Administrative Law Judges to regulate the course of the hearing including the order of proof. In the absence of clear abuse, the ruling of an Administrative Law Judge assigning the initial burden of going forward will not be overturned..... | 610 |

Proposed Findings, Conclusions or Exceptions

- | | |
|--|-----|
| 1. The requirement of the Administrative Procedure Act, that the record shall show the ruling on each finding, conclusion, or exception presented, can be satisfied without a specific separate ruling on each proposed finding, conclusion or exception; provided the total decision sufficiently informs a party of the disposition of all its proposed findings and conclusions or exceptions. 5 U.S.C. § 557(c)... | 631 |
|--|-----|

APPEALS

Generally

- | | |
|---|-----|
| 1. The Board will not disturb a finding of an Administrative Law Judge in the absence of a showing that the evidence compels a different finding..... | 439 |
| 2. Where the Administrative Law Judge has taken into consideration mitigating | |

**FEDERAL COAL MINE HEALTH
AND SAFETY ACT OF 1969—Con.
APPEALS—Con.**

Generally—Con.

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| circumstances advanced by the operator in determining the assessment of penalties, and where appellant's arguments have been fully and fairly considered by the Judge, the Board will not disturb the Administrative Law Judge's decision.... | 578 |
| 3. The Board will not disturb the findings and conclusions of an Administrative Law Judge in the absence of a showing that the evidence compels a different result..... | 781 |

CLOSURE ORDERS

Imminent Danger

- | | |
|---|-----|
| 1. Where a Bureau of Mines inspector observed an "imminently dangerous" condition, immediately issued an order of withdrawal pursuant to section 104(a) of the Act, remained on the scene until in his judgment the danger was eliminated, and then lifted the order so that normal mining operations could be resumed, he acted in a reasonable, proper and lawful manner..... | 400 |
| 2. Regardless of the unavailability of equipment, materials, or qualified technicians, an inspector is obliged to issue an order of withdrawal under section 104(a) of the Act, where, upon any inspection of a coal mine, he | |

**FEDERAL COAL MINE HEALTH
AND SAFETY ACT OF 1969—Con.
CLOSURE ORDERS—Con.**

Imminent Danger—Con.

finds that an imminent
danger exists. 30 U.S.C.
§§ 814(a), 814(h)-----

Page

632

3. Presence of 1.5 volume per
centum or more of meth-
ane supports issuance of
section 104(a) With-
drawal Order-----

656

ENTITLEMENT OF MINERS

Discharge

Burden of Proof

1. Proof by a discharged miner
that he has notified only a
member of the mine
safety committee of an
alleged violation or dan-
ger without showing a
notice or instigation
thereof to the Secretary
or his authorized repre-
sentative fails to sustain
the burden of proving a
violation of section 110(b)
(1) (A) of the Act-----

22

EVIDENCE

Sufficiency

1. A visual observation will
support a violation of sec-
tion 304(a)—accumula-
tion of coal dust-----
2. Where a notice of violation
of section 304(a) of the
Act shows no indication
of the depth or extent of
an accumulation of com-
bustible material, and
MESA's sole witness, the
the inspector who issued
the notice, has no present
recollection of the condi-
tion, for which the notice
was issued, the evidence
is insufficient to con-
stitute a prima facie
case-----

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**FEDERAL COAL MINE HEALTH
AND SAFETY ACT OF 1969—Con.**

FINDINGS

Page

1. Where an Administrative
Law Judge fails to make
the required express find-
ings of fact regarding any
of the six statutory
criteria, required by sec-
tion 109(a)(1) of the Act,
to be considered in deter-
mining the amount of a
penalty warranted, in lieu
of a remand, the Board
may make the appro-
priate findings for the
Department in accord-
ance with the evidence of
record. 30 U.S.C. § 819(a)
(1)-----

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2. Where an Administrative
Law Judge makes find-
ings of fact regarding
any of the six statutory
criteria required by sec-
tion 109(a)(1) of the Act
to be considered in deter-
mining the amount of the
penalty warranted, but
in so doing, ignores or
fails to properly apply
the evidence of record,
the Board may substitute
its findings to coincide
with the evidence and
adjust the amount of the
penalty assessed accord-
ingly. 30 U.S.C. § 819(a)
(1)-----

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HEARINGS

Generally

1. A penalty proceeding before
an Administrative Law
Judge is a *de novo* pro-
ceeding in which the
amount of a penalty as-
sessed is determined on
the basis of the evidence
presented without regard
to any assessment pro-
posed by the Assessment
Officer-----

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**FEDERAL COAL MINE HEALTH
AND SAFETY ACT OF 1969—Con.
HEARINGS—Con.**

Burden of Proof

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|--|------|
| 1. In a proceeding to review an imminent danger order of withdrawal, the operator, as the applicant, bears the burden of proof, under 43 CFR 4.587, with respect to both the threshold issue of no danger and the issue of no imminence. If the operator bears the burden of proving either issue by a preponderance of the evidence, it prevails..... | 610 |
| 2. Whether a condition or practice constitutes a violation of a mandatory health or safety standard is not an issue in a proceeding to review an imminent danger withdrawal order and MESA has no burden, under 43 CFR 4.587, of proving whether the danger involved is a violation..... | 610 |
| 3. While the burden of proving unavailability of equipment, materials, or qualified technicians required to comply with a mandatory health or safety standard is normally upon the operator, where the government's proof establishes such unavailability, the operator is relieved of the burden and may rely upon the government's evidence..... | 632 |

**FEDERAL COAL MINE HEALTH
AND SAFETY ACT OF 1969—Con.
HEARINGS—Con.**

Consolidation

- | | Page |
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| 1. Where, in a hearing on application for review (section 105), both parties agree that the identical contentions of facts and law would be offered in an assessment of civil penalty proceeding (section 109) presently pending, the Administrative Law Judge has the authority to consolidate the proceedings..... | 726 |

Decisions

- | | |
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| 1. A Notice of Violation of 30 CFR 75.400 will be upheld where the unrefuted testimony of the Bureau of Mines Inspector shows an accumulation of float coal dust in a belt conveyor entry..... | 436 |
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**Powers of Administrative
Law Judges**

- | | |
|---|-----|
| 1. An Administrative Law Judge has no authority to convert an imminent danger order of withdrawal to a notice of violation..... | 610 |
| 2. The Administrative Law Judge properly denied the motion of an operator to suppress evidence obtained in the course of a coal-mine inspection, where such motion is based on the ground that the inspector violated the Fourth Amendment prohibition against unreasonable searches, since | |

**FEDERAL COAL MINE HEALTH
AND SAFETY ACT OF 1969—Con.
HEARINGS—Con.**

**Power of Administrative
Law Judges—Con.**

an administrative tri-
bunal has no authority
to pass on constitutional
questions..... 631

Procedure

1. Upon service on the operator of a petition for assessment of a civil penalty founded upon a request for hearing, the jurisdiction of the Office of Hearings and Appeals (OHA) vests and the request for hearing, not being a pleading, cannot be withdrawn..... 604
2. An Administrative Law Judge does not have the power or authority to convert an order of withdrawal to a notice of violation..... 626
3. An Administrative Law Judge may not vacate an order of withdrawal in a civil penalty proceeding held pursuant to section 109(a)(3)..... 626
4. A hearing instituted by an operator with respect to notices of violation shall not be dismissed on motion by the operator when based upon *National Independent Coal Operators' Association et al. v. Morton et al.*, Civil Action No. 397-72 (D.C. Dist. of Col. March 9, 1973), which relates only to the validity of the procedures

**FEDERAL COAL MINE HEALTH
AND SAFETY ACT OF 1969—Con.
HEARINGS—Con.**

Procedure—Con.

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| followed by the assessment officer under 30 CFR Part 100 and does not relate to the hearing procedure pursuant to 43 CFR Part 4..... | 707 |
| 5. A party's right to withdraw a pleading is determined under the rules in effect at the time such right is exercised..... | 708 |
| 6. An Administrative Law Judge may not vacate an order of withdrawal in a civil penalty proceeding held pursuant to section 109(a)(3)..... | 716 |
| 7. Where, under 43 CFR 4.512, an operator withdraws its petition for hearing and formal adjudication after the close of an evidentiary hearing, but, prior to issuance of a final decision, it is not entitled to a dismissal without prejudice..... | 739 |
| 8. An Administrative Law Judge may not vacate an order of withdrawal in a civil penalty proceeding held pursuant to section 109(a)..... | 745 |

Summary Decisions

1. An Administrative Law Judge may not issue a summary decision upon his own motion based upon an order to show cause, because the governing regulation, 43 CFR 4.590, requires a moving party... 711

**FEDERAL COAL MINE HEALTH
AND SAFETY ACT OF 1969—Con.
HEARINGS—Con.**

Summary Decisions—Con.

2. In a proceeding to review an imminent danger withdrawal order, an Administrative Law Judge may not grant summary decision to the applicant where the record is devoid of evidence, there is a general denial of the allegations contained in the Application for Review, and there is a conceivable set of facts which the evidence may reveal which would support the position of the opponent of summary decision----- Page 711

Waiver

1. Where there are disputed issues of material fact, an Administrative Law Judge, may not grant summary decision unless there is an express waiver of hearing. 43 CFR 4.588----- 653

IMMINENT DANGER

1. The statutory definition of "imminent danger" (section 3(j) of the Act) must be read in its entirety without picking out individual words or phrases and also must be construed in conjunction with section 104(a) of the Act providing for the issuance of imminent danger orders----- 400
2. An "imminent danger" exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the affected

**FEDERAL COAL MINE HEALTH
AND SAFETY ACT OF 1969—Con.
IMMINENT DANGER—Con.**

Page

- area of the coal mine before the dangerous condition is eliminated; thus, the dangerous condition cannot be divorced from the normal work activity----- 400
3. An "imminent danger" exists where the cited condition or practice would warrant the conclusion by a reasonable man that, at the time of issuance, a proximate peril to life or limb existed and that, if normal operations to extract coal continued, a serious accident or disaster would be likely to occur before abatement----- 610
4. Where an inspector observes accumulations of float coal dust throughout an area approximately 7200 feet in length in a coal mine with a history of unpredictable releases of methane and at least one prior dust explosion, he is warranted in issuing an imminent danger withdrawal order----- 610
- Proximate Peril**
1. A proximate peril to life or limb exists where a reasonable man would conclude that the facts indicate an impending accident or disaster, threatening to kill or to cause serious physical harm, likely to occur at any moment, but not necessarily immediately----- 610

**FEDERAL COAL MINE HEALTH
AND SAFETY ACT OF 1969—Con.
INSPECTIONS AND INVESTIGATIONS**

Page

1. It was the clear intent of Congress to require neither a search warrant nor the express consent of an operator, before an inspection of a coal mine, under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §§ 813(b), 815. *Clinchfield Coal Company*, 1 IBMA 70a, 79 I.D. 655, (1972) CCH Employment Safety and Health Guide par. 15,370 (1971)----- 631

MANDATORY SAFETY STANDARDS

Generally

1. The requirement of 30 CFR 77.215(c) is applicable to refuse piles constructed prior to July 1, 1971, as well as to any constructed after that date----- 251
2. Where the evidence is sufficient to establish that the roof or ribs of a mine were not adequately supported to protect persons from falls, it is not necessary to prove a violation of the roof control plan in order to sustain a violation of section 302(a) of the Act----- 626
3. The presence of defective equipment in a working area of a mine is prima facie evidence of the violation of an applicable section of the Act; however, such evidence can be rebutted by the operator, and where he demonstrated by a preponderance of the evidence that the equipment was under

**FEDERAL COAL MINE HEALTH
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MANDATORY SAFETY STANDARDS—Con.**

Generally—Con.

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- repair, and had not been used, and was not to be operated until it met the required safety standards, no violation of the Act has occurred----- 716
4. Where the evidence is sufficient to establish that the roof or ribs of a mine were not adequately supported to protect persons from falls, it is not necessary to prove a violation of the roof control plan in order to sustain a violation of section 302(a) of the Act----- 626

Grounding

1. Use of a clamp to ground an electric hand drill is a violation of 30 CFR 75.701-3 unless approved by an inspector or some other authorized representative of the Secretary----- 802

Trailing Cable Splices

1. Where the evidence shows an operator made a defective permanent splice in a trailing cable in violation of 30 CFR 75.604, the Administrative Law Judge did not err by finding that a violation occurred or by holding that the defective permanent splice may not be deemed to be a permissible temporary splice----- 633
2. Under section 306 of the Act, 30 CFR 75.603, only one temporary splice may be made in a trailing cable at one time----- 802

**FEDERAL COAL MINE HEALTH
AND SAFETY ACT OF 1969—Con.
MODIFICATION OF APPLICATION OF
MANDATORY SAFETY STANDARDS**

Publication

- | | |
|---|-------------|
| 1. Where a proposed modification is amended subsequent to publication in the <i>Federal Register</i> , strict compliance with the provisions of section 301(c) of the Act requires republication of the new proposal..... | Page
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Stipulations

- | | |
|---|-----|
| 1. A stipulation of facts and conditions arrived at after extensive consultation and study by technical experts of the parties, in the absence of objection, and with agreement of the Bureau that the proposal will guarantee no less than the same measure of protection as the mandatory standards, shall be sufficient to support a grant of a modification of the application of mandatory standards.. | 382 |
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Waiver of Participation

- | | |
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| 1. Where a party has had <i>actual notice</i> of all proceedings relating to a petition for modification of a mandatory safety standard and elects not to participate, he shall be deemed to have waived any objection to the petition..... | 382 |
|---|-----|

NOTICES OF VIOLATION

Abatement

- | | |
|--|--|
| 1. A change in the ventilation system to eliminate accumulations of methane in a mine will not constitute a violation of section 303(k) of the Act where it is established | |
|--|--|

**FEDERAL COAL MINE HEALTH
AND SAFETY ACT OF 1969—Con.
NOTICES OF VIOLATION—Con.**

Abatement—Con.

- | | |
|--|-------------|
| that such remedial procedure was the proper corrective action..... | Page
748 |
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Elements of Proof

- | | |
|---|-----|
| 1. To sustain its burden of proving that spontaneous ignition (or combustion) occurred in refuse piles, the Bureau of Mines must show (1) that certain combustible material was present in each pile; (2) that the piles were compacted in such a way as to permit air to flow through the piles, allowing oxidation to occur and (3) that the inference of spontaneous ignition was more probably than any other inference which could be drawn from the facts proved..... | 251 |
|---|-----|

PENALTIES

- | | |
|---|-----|
| 1. Where an Administrative Law Judge is confronted with a factual determination of the effect of the amount of the penalty on the ability of an operator to continue in business under section 109(a)(1) of the Act, and the record contains no evidence on that criterion, the Judge should apply the presumption of no adverse effect in making the necessary findings..... | 317 |
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Amounts

- | | |
|---|--|
| 1. It is not merely the fact that an alleged violation is cited as a part of an imminent danger order | |
|---|--|

**FEDERAL COAL MINE HEALTH
AND SAFETY ACT OF 1969—Con.
PENALTIES—Con.**

Amounts—Continued

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of withdrawal, but the degree of danger created by the violation either standing alone or in combination with other cited violations which is determinative of the statutory criterion of gravity----- 438

Criteria

1. It is error not to consider, as part of the history of previous violations in fixing the amount of a civil penalty under section 109 of the Act, violations for which the operator has agreed to pay, under protest; the amounts assessed by the Assessment Officer----- 663

Evidence

1. A violation of section 304(d) will be upheld where an acceptable sampling of a floor area required to be rock dusted reveals the presence of less than 65 per centum of incombustibles----- 744

Existence of Violation

1. Since section 303(g) of the Act requires weekly ventilation examinations to be made in all underground coal mines and the air volume measurement to be recorded in a book approved by the Secretary, an operator cannot properly be charged for a violation of that section for merely failing to record such measurements when the Secretary had not yet approved the book for recording such

**FEDERAL COAL MINE HEALTH
AND SAFETY ACT OF 1969—Con.
PENALTIES—Con.**

Existence of Violation—Con.

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measurements at the time of inspection----- 317

Evidence

1. A fact may be inferred from circumstantial evidence, and such fact may be the basis of further inference leading to the ultimate or sought for fact----- 252

Penalty Against Operator

1. More than one person may fall within the Act's definition of "operator," but the proper party to be held liable for penalties is the operator responsible for the violations and liable for the health and safety of its employees even though such operator is an independent contractor----- 229
2. The Bureau of Mines has the initial discretion in serving orders and notices; however, since the question of the responsible operator is a factual determination, the Bureau's discretion must be subject to and withstand the scrutiny of administrative review. 229
3. Since the hearing conducted by an Administrative Law Judge in a penalty proceeding brought under section 109 of the Act is *de novo*, penalties assessed by the Judge, otherwise valid, are not unlawful solely because they are higher than the informally proposed assessments----- 631

**FEDERAL COAL MINE HEALTH
AND SAFETY ACT OF 1969—Con.
PENALTIES—Con.**

Presumptions

Ability to Continue in Business

Page

1. The application of the legal presumption that there is no adverse effect of a penalty assessment on the operator's ability to continue in business in the absence of contrary evidence produced by the operator, places no unlawful or unjust burden upon the operator since such evidence is under the exclusive control of the operator and is probative only of a mitigating consideration for the operator's own benefit. 30 U.S.C. § 819(a)(1)-----

631

Size of Business

1. The criterion of the appropriateness of a penalty to the size of an operator's business under section 109(a)(1) of the Act does not require the creation of a legal presumption because the factual information needed to apply such criterion in determining the amount of the penalty should be readily ascertainable by MESA. 30 U.S.C. §819(a)(1)-----

631

RECONSIDERATION

1. After remanding a case because there was no waiver of hearing, the Board will not grant reconsideration to decide if the Administrative Law Judge should be disqualified---

655

**FEDERAL COAL MINE HEALTH
AND SAFETY ACT OF 1969—Con.
REVIEW OF NOTICES AND
ORDERS**

Timeliness of Filing

Page

1. The mailing of an application for review is not determinative of timely filing since receipt is the governing factor-----
2. Where the delay of receipt of a properly addressed application for review beyond the expiration of the specified filing period is caused solely by the Department's own employee, the application will not be dismissed as untimely filed-----
3. Unauthorized actions of its own employees cannot be used by the Department as the basis for defeating a substantive right of a party afforded by the Act-----

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**UNAVAILABILITY OF EQUIP-
MENT, MATERIALS, OR
QUALIFIED TECHNICIANS**

Generally

1. Where an inspector observes a condition in a coal mine constituting a health or safety hazard, and is aware that the operator cannot abate such condition because of the unavailability of equipment, materials, or qualified technicians, he should not issue a notice to the operator, either under section 104(b) or section 104(h) of the Act, if he is reasonably sure that continued mining operations will not develop into an imminent danger. 30 U.S.C. §§ 814(b), 814(h)-----

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**FEDERAL COAL MINE HEALTH
AND SAFETY ACT OF 1969—Con.
UNAVAILABILITY OF EQUIP-
MENT, MATERIALS, OR
QUALIFIED TECHNICIANS—
Con.**

Notice of Violation

Page

1. Congress never intended that a notice of violation under section 104(b) of the Act be issued, or that a civil penalty be assessed, where compliance with a mandatory health or safety standard is impossible due to the unavailability of equipment, materials or qualified technicians. 30 U.S.C. §§ 814(b), 814(h), 819-----

632

Section 104(h) Notices

1. Where an inspector observes a condition in a coal mine constituting a health or safety hazard and is aware that the operator cannot abate such condition because of the unavailability of equipment, materials or qualified technicians, he should issue a notice under section 104(h) of the Act; provided, he is reasonably sure that continued mining operations will develop into an imminent danger. 30 U.S.C. §814(h)-----

632

VALIDITY OF REGULATIONS

1. The Board of Mine Operations Appeals has no authority to determine the impact, if any, the requirements of the National Environmental Policy Act and Executive Orders issued with respect thereto may have on the validity of substantive regulation promulgated by the Secretary under

**FEDERAL COAL MINE HEALTH
AND SAFETY ACT OF 1969—Con.
Validity of Regulations—Con.**

Page

the Federal Coal Mine Health and Safety Act of 1969, since the power to declare such regulations invalid lies outside the scope of the Board's delegated jurisdiction. 43 CFR 4.500-----

631

**FEDERAL EMPLOYEES AND
OFFICERS**

AUTHORITY TO BIND GOVERNMENT

1. The authority of the Government to proceed with the determination of the validity of a mining claim is not barred by laches, because Government property is not to be disposed of contrary to law, despite any acquiescence, laches, or failure to act on the part of its officers or agents-----

325

2. Where lands were not withdrawn for Indians, any express or implied consent by Indian Office officials to Navajos grazing sheep on public lands outside their reservation boundaries where no claim to the land was made under section 4 of the General Allotment Act and the lands were recognized by such officials and other government officials as public lands, rather than Indian lands, could not create Indian tribal occupancy rights to such lands superior to the Congressional grant to the State of Utah for school lands,

FEDERAL EMPLOYEES AND OFFICERS—Continued
AUTHORITY TO BIND GOVERNMENT—Con.

and the State took an unencumbered fee simple title to such sections. 444

FISH AND WILDLIFE COORDINATION ACT

GENERALLY

1. Where land has been withdrawn for state management as a wildlife area under the Fish and Wildlife Coordination Act, the Bureau of Land Management must consider the recommendations of the state and of the Bureau of Sport Fisheries and Wildlife to assure conservation of the fish and wildlife before approving a right-of-way application under the Act of March 3, 1891, for a pumping site and irrigation system. 197
2. A Bureau of Land Management decision which rejected an application under the Act of March 3, 1891, for a pumping station and irrigation system within a small cove of a reservoir withdrawn for a fish and wildlife management area pursuant to the Fish and Wildlife Coordination Act, will be sustained where it was made in due regard for the public interest in managing the area in light of that Act. 197

GRAZING AND GRAZING LANDS

1. Prior to the Taylor Grazing Act of June 28, 1934, generally open, unreserved public lands could be grazed upon without

GRAZING AND GRAZING LANDS—Con.

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federal governmental interference or regulation, but subject to certain state laws. 442

GRAZING LEASES

GENERALLY

1. An owner of lands contiguous to federal lands is not a qualified applicant for the purposes of a section 15 grazing lease preference application when the non-federal lands, which are the basis of the preference, have been leased to another party who has complete control over the livestock operation conducted thereon. 698
2. An applicant for a section 15 grazing lease has no statutory or regulatory right to a full evidentiary hearing before an administrative law judge; a hearing on issues of fact may be ordered by this Board in its discretion, but a hearing will not be ordered where the applicant does not allege the existence of facts which, if proved, would entitle her to the relief sought. 698

APPLICATIONS

1. Remedies for alleged breach of a private agreement between parties who have conflicting grazing lease applications must be sought in the courts, not in the Department of the Interior, which has no jurisdiction over such matters. 698
2. As the regulations pertaining to section 15 grazing leases now provide that a qualified applicant is one

**GRAZING LEASES—Con.
APPLICATIONS—Con.**

Page

who is in the livestock business and has a need for the grazing use of the federal land, an applicant who owns lands contiguous to federal land but fails to show she is in the livestock business and needs the federal land for grazing purposes is not qualified, and her application is properly rejected for that reason...

698

PREFERENCE RIGHT APPLICANTS

1. An applicant who asserts a preference to receive a grazing lease under section 15 of the Taylor Act must have grazing rights in excess of 50 percent on the cornering or contiguous land, and where his rights are merely permissive and are subject to revocation at any time at the will of the owner(s), no preference will be recognized.
2. An owner of lands contiguous to federal lands is not a qualified applicant for the purposes of a section 15 grazing lease preference application when the nonfederal lands, which are the basis of the preference, have been leased to another party who has complete control over the livestock operation conducted thereon.
3. As the regulations pertaining to section 15 grazing leases now provide that a qualified applicant is one who is in the livestock business and has a need for the grazing use of the federal land, an appli-

531

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**GRAZING LEASES—Con.
PREFERENCE RIGHT APPLICANTS—Con.**

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cant who owns lands contiguous to federal land but fails to show she is in the livestock business and needs the federal land for grazing purposes is not qualified, and her application is properly rejected for that reason...

698

GRAZING PERMITS AND LICENSES

GENERALLY

1. Under the Administrative Procedure Act, if a licensee has made a timely and sufficient application for a renewal of a license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency. This includes applications for grazing licenses and permits under the Taylor Grazing Act.
2. In accordance with regulation 43 CFR 4115.2-1(e)(9)(i), where the evidence establishes that no application for a grazing license was filed for two consecutive years, the base property qualifications for grazing privileges in an allotment are properly found to be lost.

777

777

ADVISORY BOARDS

1. A proposed decision of a District Manager which includes a Notice of Advisory Board Adverse Recommendation becomes the final decision of the Department of the Interior on a grazing license appli-

GRAZING PERMITS AND LICENSES—Con.

ADVISORY BOARD—Con.

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cation if no appeal is
taken in the time per-
mitted by Departmental
regulations..... 777

APPEALS

1. A proposed decision of a District Manager which includes a Notice of Advisory Board Adverse Recommendation becomes the final decision of the Department of the Interior on a grazing license application if no appeal is taken in the time permitted by Departmental regulations... 777

BASE PROPERTY (LAND)

Generally

1. Where a grazing permittee has been given two consecutive years in accordance with 43 CFR 4115.2-1(e)(9)(i) within which to increase the production of his base property or suffer the loss of all or part of his base property qualifications and, where after two growing seasons have passed but not two full years, he files an application to transfer some of the qualifications from his base property to other land acquired by him, his base property qualifications are still in good standing at the time of filing the transfer application because the term "two consecutive years" specified in the regulation means two consecutive application years and not two growing seasons. Accordingly, the District Manager should have

GRAZING PERMITS AND LICENSES—Con.

BASE PROPERTY (LAND)—Con.

Generally—Con. Page

- considered the transfer application on its merits. 18
2. Where an application to transfer base property qualifications to other land owned by an applicant is approved, the transfer is effective as of the date the transfer application was filed. A sale at a later date by the proposed transferee would not affect the transfer, and the District Manager properly may consider the transfer application if the purchasers of the property have indicated an interest in obtaining any grazing privileges for which that land is base property..... 18

Commensurability

1. Where a grazing permittee has been given two consecutive years in accordance with 43 CFR 4115.2-1(e)(9)(i) within which to increase the production of his base property or suffer the loss of all or part of his base property qualifications and, where after two growing seasons have passed but not two full years, he files an application to transfer some of the qualifications from his base property to other land acquired by him, his base property qualifications are still in good standing at the time of filing the transfer application because the term "two consecutive years" specified in the regula-

GRAZING PERMITS AND LICENSES—Con.

BASE PROPERTY (LAND)—Con. Commensurability—Con.

tion means two consecutive application years and not two growing seasons. Accordingly, the District Manager should have considered the transfer application on its merits.

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18

Transfers

1. Where a grazing permittee has been given two consecutive years in accordance with 43 CFR 4115.2-1(e)(9)(i) within which to increase the production of his base property or suffer the loss of all or part of his base property qualifications and, where after two growing seasons have passed but not two full years, he files an application to transfer some of the qualifications from his base property to other land acquired by him, his base property qualifications are still in good standing at the time of filing the transfer application because the term "two consecutive years" specified in the regulation means two consecutive application years and not two growing seasons. Accordingly, the District Manager should have considered the transfer application on its merits.
2. Where an application to transfer base property qualifications to other land owned by an applicant is approved, the transfer is effective as of the date the transfer application was filed. A sale

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BASE PROPERTY (LAND)—Con. Transfers—Con.

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at a later date by the proposed transferee would not affect the transfer, and the District Manager properly may consider the transfer application if the purchasers of the property have indicated an interest in obtaining any grazing privileges for which that land is base property.

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HOMESTEADS (ORDINARY)

(See also Additional Homesteads)

GENERALLY

1. The Indian Homestead Acts and section 4 of the General Allotment Act are settlement acts within the framework of other settlement laws pertaining to the public lands, and the practice, rules and decisions regarding white settlers on the public lands have been applied to them with certain reasonable modifications taking into account Indian habits, character, and disposition.

443

LANDS SUBJECT TO

1. Where land included in a homestead entry is described among lands withdrawn subject to valid existing rights, the withdrawal attaches to the land upon cancellation of the homestead entry.
2. Public lands which are withdrawn from all forms of appropriation under the public land laws, except location for metalliferous minerals under the

811

HOMESTEADS (ORDINARY)—Con.**LAND SUBJECT TO—Con.**

mining laws, are not subject to entry under the homestead laws.....

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INDIAN ALLOTMENTS ON PUBLIC DOMAIN**GENERALLY**

1. The Indian Homestead and General Allotment Acts manifested a general governmental policy prior to and for some time after 1900 to replace the Indian reservation and communal tribal system, to encourage individual Indians to own their own small farm lands, and to open surplus reservation lands to disposition under the public land laws.....

442

2. From the latter part of the 19th century to the Taylor Grazing Act of June 28, 1934, there was a general policy of the federal government to permit acquisition of title to open, unreserved public lands by individuals settling upon the land, including Indians, but vested rights were obtained to the lands only upon compliance with a specific act of Congress, and only for the maximum acreage allowable under that law.....

442

3. Although the school land grant to the State of Utah was subject to existing inchoate settlement claims, including any by individual Indians outside their reservation, if the claims were not perfected, the State's title to the lands vested.....

443

INDIAN ALLOTMENTS ON PUBLIC DOMAIN—Continued**GENERALLY—Con.**

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4. The Indian Homestead Acts and section 4 of the General Allotment Act are settlement acts within the framework of other settlement laws pertaining to the public lands, and the practice, rules and decisions regarding white settlers on the public lands have been applied to them with certain reasonable modifications taking into account Indian habits, character, and disposition.....

443

5. Where the Secretary of Agriculture has made a determination pursuant to section 31 of the Act of June 25, 1910, 36 Stat. 863, 25 U.S.C. § 337 (1970), that lands within a national forest are more valuable for agricultural or grazing purposes than for the timber found thereon, the Secretary of the Interior is authorized, in his discretion, to accept an application for an Indian allotment thereon, and to cause the allotment to be made. Even where such a determination by the Secretary of Agriculture has been made, the Secretary of the Interior may reject the allotment on any rational basis, including, without limitation, considerations of public policy. Such considerations may encompass

INDIAN ALLOTMENTS ON PUBLIC DOMAIN—Con.

GENERALLY—Con.

recreational and watershed values and avoidance of erosion-----

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LANDS SUBJECT TO

1. Where the Secretary of Agriculture has made a determination pursuant to section 31 of the Act of June 25, 1910, 36 Stat. 863, 25 U.S.C. § 337 (1970), that lands within a national forest are more valuable for agricultural or grazing purposes than for the timber found thereon, the Secretary of the Interior is authorized, in his discretion, to accept an application for an Indian allotment thereon, and to cause the allotment to be made. Even where such a determination by the Secretary of Agriculture has been made, the Secretary of the Interior may reject the allotment on any rational basis, including, without limitation, considerations of public policy. Such considerations may encompass recreational and watershed values and avoidance of erosion-----

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SETTLEMENT

1. Under section 4 of the General Allotment Act of 1887, no improvements or other acts of settlement are required for allotments for minor children of a qualified adult allottee who has maintained

INDIAN ALLOTMENTS ON PUBLIC DOMAIN—Con.

SETTLEMENT—Con.

settlement on his own allotment-----

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INDIAN LANDS

(See also Indian Probate.)

GENERALLY

1. The provisions of the Act of July 18, 1966, 28 U.S.C. §§ 2415 and 2416, limit the time in which the United States may file suits on behalf of Indians and Indian tribes which seek any of the remedies specified in the Act. The Act does not apply to suits brought by tribes or individuals without the assistance of the federal government, but such suits, unless they are to quiet title to trust or restricted land, are subject to the statute of limitation applicable generally-----
2. Although the Board of Land Appeals takes official notice of the findings and conclusions in an interlocutory order of the Indian Claims Commission on the claim of the Navajo Tribe of Indians against the United States, the Board's decision on a protest by the Tribe against issuance of a confirmatory patent to the State of Utah for school land sections now included within the boundaries of the Tribe's reservation is based solely upon the evidence in the hearing in the Department on this protest and

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INDIAN LANDS—Con.

GENERALLY—Con.

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upon its own application
of the law to the facts in
this case-----

441

3. The Indian Homestead and General Allotment Acts manifested a general governmental policy prior to and for some time after 1900 to replace the Indian reservation and communal tribal system, to encourage individual Indians to own their own small farm lands, and to open surplus reservation lands to disposition under the public land laws----

442

4. To determine whether any Indian occupancy by Navajos outside their recognized reservation boundaries was recognized by the Utah Enabling Act of 1894 so as to prevent the operation of the grant of lands for school purposes to the State, the intent of Congress must be ascertained by reading the provisions of the grant and the disclaimer of lands "owned or held by any Indian or Indian tribes" together, by considering the usual meaning of the words, by determining the overall purpose of the Act, and by considering the provisions in accordance with the historical milieu and public policy of that time, as well as any court interpretations of other statutes-----

442

5. The Acts of March 1, 1933, adding "vacant, unreserved, and undisposed of" public lands to the Navajo reservation, and

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GENERALLY—Con.

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of September 2, 1958, declaring lands within the exterior boundaries of the Navajo reservation in trust for the Navajo Tribe, "subject to valid existing rights," did not affect the existing title of the State of Utah in school sections which had vested in the State in 1900 when surveys were approved including the sections-----

444

6. By the Utah Enabling Act of 1894, Congress did not intend the grant of school lands to the State of Utah, effective upon survey in 1900, to be held in abeyance as to unreserved public lands which may have been within a wide, undefined perimeter of use by a proportionately few Navajo families outside their reservation grazing flocks of sheep with transitory encampments in an area also used by non-Indians for grazing purposes and wandered over by Indians from other tribes-----

444

7. Where lands were not withdrawn for Indians, any express or implied consent by Indian Office officials to Navajos grazing sheep on public lands outside their reservation boundaries where no claim to the land was made under section 4 of the General Allotment Act and the lands were recognized by such officials and other government officials as public lands, rather than Indian lands, could not

INDIAN LANDS—Con.

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create Indian tribal occupancy rights to such lands superior to the Congressional grant to the State of Utah for school lands, and the State took an unencumbered fee simple title to such sections----

444

ABORIGINAL TITLE

1. The Treaty of 1868 between the Navajo Tribe of Indians and the United States whereby the Tribe relinquished its claim to land outside the boundaries of a reservation provided thereby, extinguished the aboriginal occupancy rights of the Tribe and its members to any land outside that reservation-----

442

2. The standard used to determine the extent of an Indian tribe's aboriginal occupancy is whether the tribe occupied a defined area to the exclusion of other tribes-----

443

3. Where Indian aboriginal rights are terminated by abandonment or relinquishment by a treaty with the United States, a state may take a grant of lands unencumbered by any occupancy claims in the Indians, and where the state's title has vested, subsequent action by Congress setting the lands apart as a reservation for the Indians cannot affect the state's title. However, if a reservation has been created prior to the grant, the state's title cannot vest until the reservation is extinguished-----

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INDIAN LANDS—Con.

LEASES AND PERMITS

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Generally

1. Where an oil and gas lease provides for a term of years and as much longer thereafter as oil and gas is produced in paying quantities, upon failure of production during the primary period the lease terminates by its own terms-----

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2. Neither the payment nor the receipt of advance rentals by departmental officials on a lease which has terminated can continue or reinstate the lease----

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Oil and Gas

1. Where an oil and gas lease provides for a term of years and as much longer thereafter as oil and gas is produced in paying quantities, upon failure of production during the primary period the lease terminates by its own terms-----

786

2. Neither the payment nor the receipt of advance rentals by departmental officials on lease which has terminated can continue or reinstate the lease-----

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PATENTS

1. A Crow Indian's application for a patent in fee to lands for which a trust patent has been issued will be determined on the basis of general statutory provisions in that respect, and a decision to withhold fee patent will be overturned on appeal where there is an abuse of administrative discretion and where the record supports the conclusion

INDIAN LANDS—Continued

PATENTS—Con.

that the applicant is
capable of properly man-
aging his or her own
affairs..... Page
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TRIBAL LANDS

1. The Treaty of 1868 between the Navajo Tribe of Indians and the United States whereby the Tribe relinquished its claim to land outside the boundaries of a reservation provided thereby, extinguished the aboriginal occupancy rights of the Tribe and its members to any land outside that reservation..... 442
2. The Acts of March 1, 1933, adding "vacant, unreserved, and undisposed of" public lands to the Navajo reservation, and of September 2, 1958, declaring lands within the exterior boundaries of the Navajo reservation in trust for the Navajo Tribe, "subject to valid existing rights," did not affect the existing title of the State of Utah in school sections which had vested in the State in 1900 when surveys were approved including the sections..... 444

INDIAN PROBATE

ADMINISTRATIVE PROCEDURE

105.1 Applicability to Indian Probate

1. Judge must conform to the requirements of the Administrative Procedure Act, 5 U.S.C. § 554 (1970) and give adequate notice and afford interested party opportunity to be heard..... 295

INDIAN PROBATE—Con.

ADMINISTRATIVE PROCEDURE—Con.

105.1 Applicability to Indian Probate—Con.

2. The requirement of the Administrative Procedure Act, that all decisions of a Judge shall include a statement of findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record, is mandatory and applicable to all decisions of Judges in Indian probate proceedings..... 534, 617
3. The requirement of the Administrative Procedure Act, that all decisions of a Judge shall include a statement of findings and conclusions, on all the material issues of fact, law, or discretion presented on the record, is mandatory and applicable to all decisions of Judges in Indian Probate proceedings..... 620

105.2 Official Notice, Record

1. Official notice of documents and records will not be taken unless they are introduced in evidence or unless an order or stipulation provides to the contrary..... 534, 618, 620

APPEAL

130.6 Standing to Appeal

1. Although the Superintendent of an Indian Agency has no interest in the outcome he is a proper official of the Bureau of Indian Affairs to file a petition for reopening and to appeal from a denial thereof under authority of 43 CFR 4.242(d)..... 620

INDIAN PROBATE—Con.

ATTORNEYS AT LAW

140.2 Fees

- | | |
|--|-------------|
| 1. Contracts between attorneys and Indian clients for fees are not controlling upon the Government when payment is to be made from the funds of a restricted or trust estate.... | Page
390 |
| 2. Attorney's fees in Indian probate will be determined on the basis of "reasonableness" a corollary of "quantum meruit" defined "as much as he deserved"..... | 390 |
| 3. When an attorney seeks a fee allowance from a Judge other than the one before whom he appeared while performing legal services, it is incumbent upon him to make proof of the extent of the services and the skill employed; the record must be complete when the matter reaches the reviewing authority; and in such cases a claim for fees based solely upon the gross number of hours worked multiplied by an arbitrary rate per hour will be given little credence..... | 390 |

CLAIM AGAINST ESTATE

165.1 Allowable Items

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|---|-----|
| 1. A claim for attorney's fee is not allowable as a charge against the estate where the services were performed on behalf of the attorney's client and were neither on behalf of the estate nor of benefit to the estate..... | 274 |
| 2. A claim for attorney's fee by an attorney who successfully or unsuccessfully represented a client whose | |

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CLAIM AGAINST ESTATE—Con.

165.1 Allowable Items—Con.

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| interests were in opposition to creditors of the estate and the heirs at law is a private business matter between attorney and his client and not a proper claim against the estate as an administration expense..... | Page
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165.2 Care and Support

- | | |
|---|-----|
| 1. In the absence of an expressed or implied contract providing for compensation for personal services rendered the decedent relative, such services are presumed gratuitous..... | 274 |
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165.10 Proof of Claim

- | | |
|--|-----|
| 1. When an objection is made to, and evidence is submitted challenging the validity of a creditor's claim, the creditor must be present at the hearing and the burden is on the creditor to prove his claim..... | 295 |
|--|-----|

INHERITING

285.0 Generally

- | | |
|--|-----|
| 1. There is a presumption that a decedent left heirs or next of kin capable of inheriting. Where there is the possibility of an escheat the presumption is even stronger, and the burden shifts to those favoring escheat to prove there are not heirs as escheats are not favored by the law..... | 309 |
| 2. State statutes of descent and distribution as construed and interpreted by the highest court of the state involved will be considered by the Department as controlling in trust heirship proceedings..... | 728 |

INDIAN PROBATE—Con.**INHERITING—Con.****Page****285.4 Moiety**

1. A moiety is defined as a one-half interest in an estate... 309
2. Where there are no descendants of the paternal grandparents the paternal moiety passes to the heirs of the maternal grandparents..... 309

MARRIAGE**325.0 Generally**

1. Indian marriages are based upon the usages and customs of the tribe or tribes involved..... 731

325.3 Indian Custom

1. Indian marriages are based upon the usages and customs of the tribe or tribes involved..... 731

REHEARING**370.0 Generally**

1. A petition for rehearing, based upon evidence which fails effectively to controvert the basis of the initial decision in the matter, will be disallowed..... 295
2. A rehearing will be granted where the original hearing did not conform with the standards of a full opportunity to be heard embodied in the Administrative Procedure Act (5 U.S.C. §§ 554 and 556 (1970))..... 535, 618
3. A rehearing will be granted when the record does not support the Judge's findings..... 659, 731

REOPENING**375.0 Generally**

1. Although the Superintendent of an Indian Agency has no interest in the outcome he is a proper official

INDIAN PROBATE—Con.**REOPENING—Con.****Page****375.0 Generally—Con.**

- of the Bureau of Indian Affairs to file a petition for reopening and to appeal from a denial thereof under authority of 43 CFR 4.242 (d)..... 620
2. In the absence of compelling reasons and failure to allege the existence of a manifest injustice or how it might be corrected if reopening were permitted, a petition to reopen will be denied when it is filed more than three years after the final determination of heirs was made..... 665
- 375.1 Waiver of Time Limitation**
 1. Petition to reopen filed more than three years after the final determination will not be granted unless there is compelling proof that the delay was not occasioned by the lack of diligence on the part of one who is petitioning... 665
 2. A petition to reopen filed more than three years after the final determination of heirs will not be granted unless there is compelling proof that the delay was not occasioned by the lack of diligence on the part of the petitioning party..... 709
 3. It is in the public interest to require Indian Probate proceedings be concluded within some reasonable time in order that property rights of heirs and devisees in Indian allotments be stabilized..... 709

INDIAN PROBATE—Con.

REOPENING—Con.

375.1 Waiver of Time Limitation—Con.

4. To avoid perpetuating a manifest injustice, a petition to reopen filed more than three years after the final determination of the heirs will be granted where compelling proof is shown that the delay was not occasioned by the lack of diligence on the part of the petitioning party-----

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5. Petition to reopen filed more than three years after the final determination of heirs will not be granted unless there is compelling proof that the delay was not occasioned by the lack of diligence on the part of the petitioning party-----

809

6. It is in the public interest to require Indian probate proceedings to be concluded within some reasonable time in order that property rights of heirs and devisees in Indian allotments be stabilized-----

809

SECRETARY'S AUTHORITY

381.0 Generally

1. The Secretary of the Interior has by express terms reserved to himself the power to waive and make exceptions to his regulations affecting Indian matters-----

659

WILLS

425.20 Proof of Will

1. No will can be approved as self-proved unless the record supports a finding by the Judge that such will and the affidavits

INDIAN PROBATE—Con.

WILLS—Con.

425.20 Proof of Will—Con.

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accompanying it have been presented at the hearing to all parties present for consideration and that it is uncontested. Such findings may then support a conclusion that the documents meet the requirements of 43 CFR 4.233(a); and that it may be ordered approved-----

620

INDIAN TRIBES

(See also Indian Probate.)

GENERALLY

1. "Delegation." The use of the term "delegation" in *Solicitor's Opinion*, M-36803 (Apr. 3, 1970), 77 I.D. 50 (1970) interpreting 25 U.S.C. § 48 allowing Indian tribes to " * * be given * * " direction over Federal employees, does not add substances to the argument that the statute is an unconstitutional delegation of authority prohibited by *Schechter Poultry v. United States*, 295 U.S. 495 (1935)-----

218

2. The provisions of the Act of July 18, 1966, 28 U.S.C. §§ 2415 and 2416, limit the time in which the United States may file suits on behalf of Indians and Indian tribes which seek any of the remedies specified in the Act. The Act does not apply to suits brought by tribes or individuals without the assistance of the federal government, but such suits, unless they are to quiet title to trust

INDIAN TRIBES—Con.**GENERALLY—Con.**

or restricted land, are subject to the statute of limitation applicable generally-----

Page

220

3. The Navajo Tribe of Indians has standing within the Department of the Interior to contest or protest against the issuance of a confirmatory patent to the State of Utah for school sections within the exterior boundary of the reservation for the Tribe-----

442

INDIANS**GENERALLY**

1. There is a well-established rule of statutory construction to favor Indians in case of doubt as to the meaning of words in treaties or legislation in their behalf; however, the rule is not inflexible in its application and must give way where such action is warranted by other rules of construction and the circumstances of the case-----
2. Historical differences between the situation in Alaska and the other states afford reasons for different interpretations of legislation pertaining to Alaska natives and legislation pertaining to Indians in the other states. Therefore section 8 of the Act of May 17, 1884, regarding the occupancy of Alaska natives and others upon public land, is not *in pari materia* with the disclaimer provision in section 3 of the Utah Enabling Act of 1894, as to lands "owned or held by any Indian or Indian Tribes"-----

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443

INDIANS—Con.**CIVIL JURISDICTION**

Page

1. The provisions of the Act of July 18, 1966, 28 U.S.C. §§ 2415 and 2416, limit the time in which the United States may file suits on behalf of Indians and Indian tribes which seek any of the remedies specified in the Act. The Act does not apply to suits brought by tribes or individuals without the assistance of the federal government, but such suits, unless they are to quiet title to trust or restricted land, are subject to the statute of limitation applicable generally-----

220

COMPETENCY

1. A Crow Indian's application for a patent in fee to lands for which a trust patent has been issued will be determined on the basis of general statutory provisions in that respect, and a decision to withhold fee patent will be overturned on appeal where there is an abuse of administrative discretion and where the record supports the conclusion that the applicant is capable of properly managing his or her own affairs-----

804

HUNTING AND FISHING

1. The Muckleshoot Indian Tribe is an existing federally recognized tribal entity that is a political successor in interest of some of the Indian tribes or bands which were parties to the Treaties of Medicine Creek, 10 Stat. 1132, and Point Elliott, 12 Stat. 927, and there-

INDIANS—Con.

HUNTING AND FISHING—Con.	Page
fore the tribe possesses off-reservation fishing rights.....	222

MINERAL LEASING ACT

GENERALLY

1. The holder of a coal prospecting permit is entitled to a lease pursuant to section 2 of the Mineral Leasing Act of 1920, *as amended*, 30 U.S.C. §201(b) (1970), if he shows to the satisfaction of the Secretary of the Interior that the land contains coal in commercial quantities discovered prior to the expiration of his permit.....

624

MINERAL LEASING ACT FOR ACQUIRED LANDS

GENERALLY

1. The regulatory requirement that an acquired lands oil and gas lease offer must be accompanied by a statement showing the extent of the offeror's ownership of the operating rights to the fractional mineral interest not owned by the United States in each tract covered by the offer to lease is satisfied by a statement to the effect that the offeror does not own an oil and gas lease on any part of the lands in question.....

395

MINING CLAIMS

GENERALLY

1. The authority of the Government to proceed with the determination of the validity of a mining claim is not barred by laches, because Government property is not to be disposed of contrary to

MINING CLAIMS—Con.

GENERALLY—Con.

Page

law, despite any acquiescence, laches, or failure to act on the part of its officers or agents.....

325

COMMON VARIETIES OF MINERALS

Generally

1. Where mining claims are located after enactment of the Act of July 23, 1955, for deposits of naturally colored volcanic stone having various colors, the stone being mined, crushed, sold, and used for roofing rock, the deposits are common varieties of stone and are not subject to location under the mining laws after July 23, 1955, where it is shown that similar volcanic stone is of widespread occurrence and that the claimants obtain the same price in the market for the stone as their competitors who produce and sell similar naturally colored volcanic stone. It is not enough to remove the stone in issue from the common varieties category merely to show that it sells for a somewhat higher price than other commonly occurring rocks used for the same purpose that are less attractively colored, such as crushed granite, limestone and pea gravel.....

261

2. Where placer mining claims are located after July 23, 1955, for deposits of building stone, the stone may be an uncommon variety subject to location where it commands a higher price in the market-

MINING CLAIMS—Con.

COMMON VARIETIES OF MINERALS—Con.

Generally—Continued

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place because of its unique patterns and coloration characteristics-----

409

3. The Act of July 23, 1955, as amended, 30 U.S.C. §611 (1970), had the effect of excluding from the coverage of the mining laws "common varieties" of building stone, but left the Act of August 4, 1892, 30 U.S.C. § 161 (1970), authorizing the location of building stone placer mining claims, effective as to building stone that has "some property giving it distinct and special value"-----

409

4. To determine whether a deposit of building stone is of a common or uncommon variety, there must be a comparison of the deposit with other deposits of similar type materials in order to ascertain whether the deposit has a property giving it a distinct, and special value. If the deposit is to be used for the same purposes as minerals of common occurrence, then there must be a showing that some property of the deposit gives it a special value for such use and generally this value is reflected by the fact that the material commands a higher price in the market place-----

409

5. To satisfy the requirements for discovery on a placer mining claim located for common varieties of sand and gravel before July 23,

MINING CLAIMS—Con.

COMMON VARIETIES OF MINERALS—Con.

Generally—Continued

Page

1955, it must be shown that the materials within the limits of the claim, by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, could have been extracted, removed, and marketed at a profit as of that date. Where a claimant fails to make such a showing, the claim is properly declared null and void-----

572

6. To determine whether a deposit of sand and gravel is of a common or uncommon variety, there must be a comparison of the deposit with other deposits of similar type materials to ascertain whether the deposit has a property giving it distinct and special value. If the deposit is to be used for the same purposes as minerals of common occurrence, then there must be a showing that some property of the deposit gives it a special value for such use, and that such value is reflected generally by the fact that the material commands a higher price in the marketplace-----

572

Special Value

1. Where mining claims are located after enactment of the Act of July 23, 1955, for deposits of naturally colored volcanic stone having various colors, the

MINING CLAIMS—Con.

COMMON VARIETIES OF MINERALS—Con.

Special Value—Con.

stone being mined, crushed, sold, and used for roofing rock, the deposits are common varieties of stone and are not subject to location under the mining laws after July 23, 1955, where it is shown that similar volcanic stone is of widespread occurrence and that the claimants obtain the same price in the market for the stone as their competitors who produce and sell similar naturally colored volcanic stone. It is not enough to remove the stone in issue from the common varieties category merely to show that it sells for a somewhat higher price than other commonly occurring rocks used for the same purpose that are less attractively colored, such as crushed granite, limestone and pea gravel.

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CONTESTS

1. A mining claimant is the proponent of the validity of his claim under the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* (1970), and has the burden of overcoming by a preponderance of evidence the Government's prima facie case of failure to comply with the location requirements of the mining law and of lack of discovery of a valuable mineral deposit.

324

2. Despite the fact that the Government's witnesses were not present on each

MINING CLAIMS—Con.

CONTESTS—Con.

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claim in contest, their testimony taken with the testimony of the principal contestee, called as part of the Government's case in chief, may be sufficient to establish a prima facie case that the mining claims are invalid.

324

3. When a mining claimant has failed to answer a complaint in a mining contest, the allegations are deemed admitted under 43 CFR 4.450-7 and the Manager will decide the case without a hearing.

324

4. When, pursuant to 43 CFR 4.450-7, a Manager has decided a mining contest against a defaulting contestee and no timely appeal was taken therefrom, a late appeal will be dismissed under 43 CFR 4.411(b).

324

5. A defaulting contestee cannot rely on an answer filed by a co-claimant when such answer never purported to be on the defaulting contestee's behalf.

324

6. A mining claimant is not denied due process merely because of prehearing publicity where he fails to show that there was any unfairness in the contest proceeding itself.

325

7. The failure of the Government to contest other unpatented mining claims in a given area cannot support a charge of discrimination when a mining claimant fails to show that such action was arbitrary or prejudiced his rights in any way.

325

MINING CLAIMS—Con. CONTESTS—Con.

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|---|-------------|
| 8. It is not necessary for the Government to prepare an environmental impact statement before issuing a patent to a mining claim, as the patenting of a mining claim is not a "major Federal action" within the ambit of section 102 of the National Environmental Policy Act, 42 U.S.C. § 4332 (1970)----- | Page
538 |
| 9. Where a prima facie case rests upon the establishment of a negative fact, but the other party has peculiar knowledge or control of the evidence as to such matter, the burden rests upon him to produce such evidence of sufficient weight and credibility, and failing, the negative will be presumed to have been established. This principle applies in a mining claim contest to the extent that where the Government has made a prima facie case of non-marketability, and the contestee only testifies that he made sales but fails to buttress that testimony with specific data as to the sales or provide corroborating evidence thereof, he will be deemed to have failed in his burden of proof.--- | 572 |

DETERMINATION OF VALIDITY

1. Where mining claims are located after enactment of the Act of July 23, 1955 for deposits of naturally colored volcanic stone having various colors, the stone being mined, crushed, sold, and

MINING CLAIMS—Con. DETERMINATION OF VALIDITY—Con.

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|---|-------------|
| used for roofing rock, the deposits are common varieties of stone and are not subject to location under the mining laws after July 23, 1955, where it is shown that similar volcanic stone is of widespread occurrence and that the claimants obtain the same price in the market for the stone as their competitors who produce and sell similar naturally colored volcanic stone. It is not enough to remove the stone in issue from the common varieties category merely to show that it sells for a somewhat higher price than other commonly occurring rocks used for the same purpose that are less attractively colored, such as crushed granite, limestone and pea gravel.--- | Page
261 |
| 2. The Department of the Interior has been granted plenary power in the administration of the public lands, and it has authority, after proper notice and upon adequate hearing, to determine the validity of an unpatented mining claim.----- | 324 |
| 3. Where a mineral claimant has located a group of claims, he must show a discovery on each claim located to satisfy the requirements of the mining laws.----- | 572 |

DISCOVERY

1. A hearing under section 5 of the Surface Resources Act of July 23, 1955, directed only to a portion of a claim is insufficient

MINING CLAIMS—Con.

DISCOVERY—Con.

to establish an absence of a discovery as to the whole claim as the locator may still have a valuable mineral deposit on that portion of the claim not challenged by the Government..... 792

Generally

1. A mining claimant is the proponent of the validity of his claim under the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* (1970), and has the burden of overcoming by a preponderance of evidence the Government's prima facie case of failure to comply with the location requirements of the mining law and of lack of discovery of a valuable mineral deposit..... 324
2. Where a mining claimant's testimony as to location and discovery is superficial and implausible, it is reasonable for the Administrative Law Judge to conclude from the evidence and the testimony of other witnesses that none of the claims was located according to the requirements of the mining laws and that no discovery was made thereon..... 324
3. Where locatable minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in

MINING CLAIMS—Con.

DISCOVERY—Con.

GENERALLY—Con.

- developing a mine, a discovery exists within the meaning of the mining laws..... 409
4. The Board of Land Appeals will set aside its former decision and remand a contest proceeding for further hearing where on reconsideration of such decision it finds additional evidence is necessary for a final determination..... 538
 5. Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would not be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine, a discovery does not exist within the meaning of the mining laws..... 572
 6. To verify whether a discovery of a valuable mineral deposit has been made, a government mineral engineer need not explore or sample beyond those areas which have been exposed by the claimant; he is not required to do the discovery work for the claimant..... 792
 7. Testimony by a government mineral engineer that he examined the mining claims and the workings thereon and sample the area recommended by the claimant but found no evidence of a valuable mineral deposit which would have in the past or

MINING CLAIMS—Con.**DISCOVERY—Con.****Generally—Con.**

present justified a person of ordinary prudence in the further expenditure of his time and means in an effort to develop a valuable mine, is sufficient to establish a prima facie case of absence of a discovery so as to subject a mining claim to the limitations imposed by section 4 of the Act of July 23, 1955-----

Page

792

8. Under the mining laws one discovery anywhere on a claim is sufficient to constitute a discovery as to the whole claim-----

792

Marketability

1. The marketability test of discovery is applicable to all minerals, including intrinsically valuable minerals-----
2. The fact that alumina, the raw material from which aluminum is produced, is present in the area of a group of mining claims does not satisfy the marketability test of discovery when there is no known process by which aluminum may be extracted from the particular alumina-bearing mineral compounds on a profitable basis-----
3. In applying the prudent-man test a critical factor to be considered, especially in the case of widespread nonmetallic mineral, is whether the claimed material is marketable. To establish the marketability of a widespread nonmetallic mineral a

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MINING CLAIMS—Con.**DISCOVERY—Con.****Marketability—Con.**

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contestee must show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit-----

409

4. Where a prima facie case rests upon the establishment of a negative fact, but the other party has peculiar knowledge or control of the evidence as to such matter, the burden rests upon him to produce such evidence of sufficient weight and credibility, and failing, the negative will be presumed to have been established. This principle applies in a mining claim contest to the extent that where the Government has made a prima facie case of non-marketability, and the contestee only testifies that he made sales but fails to buttress that testimony with specific data as to the sales or provide corroborating evidence thereof, he will be deemed to have failed in his burden of proof-----
5. To satisfy the requirements for discovery on a placer mining claim located for common varieties of sand and gravel before July 23, 1955, it must be shown that the materials within the limits of the claim, by reason of accessibility, bona fides in development, proximity to mar-

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**MINING CLAIMS—Con.
DISCOVERY—Con.**

Marketability—Con.

ket, existence of present demand, and other factors, could have been extracted, removed, and marketed at a profit as of that date. Where a claimant fails to make such a showing, the claim is properly declared null and void-----

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HEARINGS

1. Evidence tendered on appeal in a mining contest may not be considered except for the limited purpose of deciding whether a further hearing is warranted, since the record made at the hearing must be the sole basis for decision----
2. The Board of Land Appeals will set aside its former decision and remand a contest proceeding for further hearing where on reconsideration of such decision it finds additional evidence is necessary for a final determination----

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538

LOCATION

1. Even though a placer mining claim is located by legal subdivisions on surveyed land, 43 CFR 3401.1 (1966) [now 43 CFR 3831.1] requires, in part, that the corners of the claim be staked and that a notice of location be posted thereon in order for such a location to be valid-----
2. Where a mining claimant's testimony as to location and discovery is superficial and implausible, it is reasonable for the Administrative Law Judge

324

MINING CLAIMS—Con.

LOCATION—Continued

Page

to conclude from the evidence and the testimony of other witnesses that none of the claims was located according to the requirements of the mining laws and that no discovery was made thereon-----

324

PATENTS

1. It is not necessary for the Government to prepare an environmental impact statement before issuing a patent to a mining claim, as the patenting of a mining claim is not a "major Federal action" within the ambit of section 102 of the National Environmental Policy Act, 42 U.S.C. § 4332 (1970)-----

538

PLACER CLAIMS

1. Even though a placer mining claim is located by legal subdivisions on surveyed land, 43 CFR 3401.1 (1966) [now 43 CFR 3831.1] requires, in part, that the corners of the claim be staked and that a notice of location be posted thereon in order for such a location to be valid-----

324

SURFACE USES

1. In a proceeding under section 5 of the Surface Resources Act of July 23, 1955, to determine whether a mining claim is subject to the limitations and restrictions of section 4 of the Act, the issue is whether or not there is now disclosed within the boundaries of each claim valuable minerals of sufficient quantity, quality, and worth

**MINING CLAIMS—Con.
SURFACE USES—Con.**

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to constitute a discovery, and whether the discovery was made prior to the effective date of the Act-----

792

2. Testimony by a government mineral engineer that he examined the mining claims and the workings thereon and sampled the areas recommended by the claimant but found no evidence of a valuable mineral deposit which would have in the past or present justified a person of ordinary prudence in the further expenditure of his time and means in an effort to develop a valuable mine, is sufficient to establish a prima facie case of absence of a discovery so as to subject a mining claim to the limitations imposed by section 4 of the Act of July 23, 1955-----

792

3. Where a verified statement filed pursuant to the Surface Resources Act of July 23, 1955, fails to set forth, as required by section 5(a)(3) of the Act, all of the sections of public land which are embraced within each of the claimant's mining claims, the statement is defective as to an inadequately described claim and said claim is subject to the limitations and restrictions of the Act-----

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**NATIONAL ENVIRONMENTAL
POLICY ACT OF 1969**

GENERALLY

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1. It is not necessary for the Government to prepare an environmental impact statement before issuing a patent to a mining claim, as the patenting of a mining claim is not a "major Federal action" within the ambit of section 102 of the National Environmental Policy Act, 42 U.S.C. § 4332 (1970)-----

538

ENVIRONMENTAL STATEMENTS

1. In accordance with guidelines provided by the Council on Environmental Quality, 36 F.R. 7724, detailed environmental statements are not required under section 102 (2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4331(2)(C) (1970), in connection with the cancellation of a timber sale contract where it is not reasonable to anticipate a cumulatively significant adverse effect on the environment-----

203

NAVIGABLE WATERS

1. A lake is navigable in fact when it is used, or is susceptible of being used, in its ordinary condition, as a highway for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. A meandered lake in Montana, containing 125 acres and which is not over

NAVIGABLE WATERS—Con.

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waist deep, is nonnavigable where it is located in a remote region and there is no evidence to show that it has been used in the past or is susceptible of being used as a highway for commerce in the future.....

312

2. Title to the underlying bed of a meandered lake which is held to be nonnavigable remains in the United States where all of the abutting uplands surrounding the lake are still public lands.....

312

3. The Secretary of the Interior has the authority and the duty to determine what lands are public lands of the United States, including the authority to determine navigability of a lake to ascertain whether title to the land underlying the lake remains in the United States or whether title passed to a State upon its admission into the Union.....

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OIL AND GAS LEASES**GENERALLY**

1. An oil and gas lessee must comply with all the lease terms, including the operating regulations, at his own expense.....

322

ACQUIRED LAND LEASES

1. The regulatory requirement that an acquired lands oil and gas lease offer must be accompanied by a statement showing the extent of the offeror's ownership of the operating rights to the fractional mineral interest not owned by the United States in each tract cov-

**OIL AND GAS LEASES—Con.
SURFACE USES—Con.**

Page

ered by the offer to lease is satisfied by a statement to the effect that the offeror does not own an oil and gas lease on any part of the lands in question.....

395

APPLICATIONS**Generally**

1. The regulatory requirement that an acquired lands oil and gas lease offer must be accompanied by a statement showing the extent of the offeror's ownership of the operating rights to the fractional mineral interest not owned by the United States in each tract covered by the offer to lease is satisfied by a statement to the effect that the offeror does not own an oil and gas lease on any part of the lands in question.....

395

FUTURE AND FRACTIONAL INTEREST LEASES

1. Where an applicant for a future interest oil and gas lease of acquired lands has interests only in the land below 1,000 feet below the surface, it does not own or control all or substantially all of the present operating rights to the minerals in the land; if it seeks only a lease for the zone below 1,000 feet, it is requesting a lease of a horizontal zone, which is granted, if at all, only where the need for it is clear and convincing; in either case its offer for a future interest lease must be rejected.....

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OIL AND GAS LEASES—Con.**ROYALTIES**

Page

1. In determining the amount of royalty due to the United States from production of natural gas from an oil and gas lease pursuant to sec. 3, Act of August 8, 1946, 60 Stat. 951, it is proper for the Geological Survey to use a base value which includes both the purchase price paid for the natural gas as established by the Federal Power Commission plus any additional sum paid by the purchaser of the gas to unit operator as consideration for the purchase of gas from the unit of which the federal lease is a part.. 599

SUSPENSIONS

1. An oil and gas lessee must comply with all the lease terms, including the operating regulations, at his own expense..... 322

PATENTS OF PUBLIC LANDS**GENERALLY**

1. Where the Secretary of the Interior is required by the Act of June 21, 1934, upon application by a state, to issue a patent to the state for school lands and to show the date title vested and the extent to which the lands are subject to prior conditions, limitations, easements, or rights, if any, he (and his delegates) may determine questions of law as well as fact, including a determination as to whether title passed under the school land grant..... 441

PUBLIC LANDS**GENERALLY**

Page

1. From the latter part of the 19th century to the Taylor Grazing Act of June 28, 1934, there was a general policy of the federal government to permit acquisition of title to open, unreserved public lands by individuals settling upon the land, including Indians, but vested rights were obtained to the lands only upon compliance with a specific act of Congress, and only for the maximum acreage allowable under that law... 442

JURISDICTION OVER

1. The Secretary of the Interior has the authority and the duty to determine what lands are public lands of the United States, including the authority to determine navigability of a lake to ascertain whether title to the land underlying the lake remains in the United States or whether title passed to a State upon its admission into the Union..... 313

RAILROAD GRANT LANDS

1. A release filed by a land-grant railroad pursuant to section 321(b) of the Transportation Act of 1940, 54 Stat. 954, extinguishes the right of the railroad or its attorneys-in-fact to select lands or receive compensation in lieu of lands originally acquired by it under the Act of July 27, 1866, in aid of construction of the railroad but relinquished under the Act of June 4, 1897..... 302

RIGHTS-OF-WAY

(See also Indian Lands.)

GENERALLY

- | | |
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| | Page |
| 1. There is no grant of a right-of-way under the Act of March 3, 1891, as to withdrawn lands without approval of the Secretary of the Interior, who may deny an application and approval of maps filed thereunder upon reasonable grounds, or condition approval as to the location of the improvements to be constructed. | 197 |
| 2. Where land has been withdrawn for state management as a wildlife area under the Fish and Wildlife Coordination Act, the Bureau of Land Management must consider the recommendations of the state and of the Bureau of Sport Fisheries and Wildlife to assure conservation of the fish and wildlife before approving a right-of-way application under the Act of March 3, 1891, for a pumping site and irrigation system. | 197 |
| 3. A Bureau of Land Management decision which rejected an application under the Act of March 3, 1891, for a pumping station and irrigation system within a small cove of a reservoir withdrawn for a fish and wildlife management area pursuant to the Fish and Wildlife Coordination Act, will be sustained where it was made in due regard for the public interest in managing the area in light of that Act. | 197 |

RIGHTS-OF-WAY—Con.

ACT OF MARCH 3, 1891

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|---|-----|
| 1. There is no grant of a right-of-way under the Act of March 3, 1891, as to withdrawn lands without approval of the Secretary of the Interior, who may deny an application and approval of maps filed thereunder upon reasonable grounds, or condition approval as to the location of the improvements to be constructed. | 197 |
| 2. Where land has been withdrawn for state management as a wildlife area under the Fish and Wildlife Coordination Act, the Bureau of Land Management must consider the recommendations of the state and of the Bureau of Sport Fisheries and Wildlife to assure conservation of the fish and wildlife before approving a right-of-way application under the Act of March 3, 1891, for a pumping site and irrigation system. | 197 |
| 3. A Bureau of Land Management decision which rejected an application under the Act of March 3, 1891, for a pumping station and irrigation system within a small cove of a reservoir withdrawn for a fish and wildlife management area pursuant to the Fish and Wildlife Coordination Act, will be sustained where it was made in due regard for the public interest in managing the area in light of that Act. | 197 |

RULES OF PRACTICE

(See Also Contracts, Federal Coal Mine Health and Safety Act of 1969, Indian Probate.)

GENERALLY

1. Under the Administrative Procedure Act, if a licensee has made a timely and sufficient application for a renewal of a license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency. This includes applications for grazing licenses and permits under the Taylor Grazing Act-----

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APPEALS**Generally**

1. A contractor's application to take depositions of retired Bureau employees and of a newspaper reporter will be denied, since such prospective witnesses are not under the control of the Government and the Board has no jurisdiction over third parties----- 299
2. A contractor who fails to take advantage of Government offers to examine certain information relative to its claims is not entitled to have its application to take the depositions of Government employees for purposes of discovery granted, as the contractor has not shown good cause as required by the Board's rule governing discovery (43 CFR 4.115)----- 299
3. An appeal will be dismissed where there is no justici-

RULES OF PRACTICE—Con.**APPEALS—Con.****Generally—Con.**

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- able issue or where the appeal is moot----- 322
4. Upon appeal from a decision of an Administrative Law Judge, the Board of Land Appeals may make all findings of fact and conclusions of law based upon the record just as though it were making the decision in the first instance----- 409

BURDEN OF PROOF

1. A construction contractor's claim for an equitable adjustment is denied where the evidence shows that payment for the overlay work involved in repairing eroded pavement was provided for in an accepted change order and the appellant failed to sustain its burden of showing that the straitened financial circumstances in which the contractor was in at the time of the change order was the result of wrongful action by the contracting officer or other Government personnel administering the contract under which the claim of duress was asserted----- 189
2. The Board denies a Government motion for reconsideration where it finds that a diary entry contained in an exhibit offered in evidence by the Government, together with the testimony of a witness for the appellant created an inference that the Government was responsible for an indeterminate portion of a pro-

RULES OF PRACTICE—Con.

APPEALS—Con.

Burden of Proof—Con.

Page

tracted delay in removing utility poles from the work area on a road construction job and that the Government failed to rebut such inference even though information having a direct bearing on the propriety of liquidated damages assessed for delayed performance was apparently within its possession or was more accessible to it than it was to the appellant. The Board therefore reaffirmed its prior holdings that no attempt should be made to apportion the delay between the parties and that the contract time should be extended to the date the contract was determined to be substantially complete...

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3. A contractor under a contract for the construction of a road has not sustained its burden of proof where the only evidence offered by it in support of a particular claim is the testimony of one witness who repeated the allegations contained in the contractor's original claim letter, as such assertions have no probative weight in the absence of further amplification and documentation.....

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Dismissal •

1. Where a supply contract which provided for the delivery and installation of a television antenna system did not contain a "Suspension of the

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Work" or other "pay for delay" clause and the Government issued a modification postponing the delivery date because the building in which the system was to be installed had not been completed, the Board dismissed as beyond its jurisdiction the contractor's claim for costs incurred in maintaining a crew in readiness to perform the installation inasmuch as the postponement of the delivery date was not a change within the meaning of the "Changes" clause.....

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Failure to Appeal

1. A proposed decision of a District Manager which includes a Notice of Advisory Board Adverse Recommendation becomes the final decision of the Department of the Interior on a grazing license application if no appeal is taken in the time permitted by Departmental regulations...

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Hearings

1. An applicant for a section 15 grazing lease has no statutory or regulatory right to a full evidentiary hearing before an administrative law judge; a hearing on issues of fact may be ordered by this Board in its discretion, but a hearing will not be ordered where the applicant does not allege the existence of facts which, if proved, would entitle her to the relief sought.....

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Standing to appeal

1. The Navajo Tribe of Indians has standing within the Department of the Interior to contest or protest against the issuance of a confirmatory patent to the State of Utah for school sections within the exterior boundary of the reservation for the Tribe.

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EVIDENCE

1. The Board denies a Government motion for reconsideration where it finds that a diary entry contained in an exhibit offered in evidence by the Government, together with the testimony of a witness for the appellant created an inference that the Government was responsible for an indeterminate portion of a protracted delay in removing utility poles from the work area on a road construction job and that the Government failed to rebut such inference even though information having a direct bearing on the propriety of liquidated damages assessed for delayed performance was apparently within its possession or was more accessible to it than it was to the appellant. The Board therefore reaffirmed its prior holdings that no attempt should be made to apportion the delay between the parties and that the contract time should be extended to the date the contract was determined to be substantially complete.

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2. A contractor's application to take depositions of retired Bureau employees and of a newspaper reporter will be denied, since such prospective witnesses are not under the control of the Government and the Board has no jurisdiction over third parties.
3. A contractor who fails to take advantage of Government offers to examine certain information relative to its claims is not entitled to have its application to take the depositions of Government employees for purposes of discovery granted, as the contractor has not shown good cause as required by the Board's rule governing discovery (43 CFR 4.115).
4. A mining claimant is the proponent of the validity of his claim under the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* (1970), and has the burden of overcoming by a preponderance of evidence the Government's prima facie case of failure to comply with the location requirements of the mining law and of lack of discovery of a valuable mineral deposit.
5. Where a mining claimant's testimony as to location and discovery is superficial and implausible, it is reasonable for the Administrative Law Judge to conclude from the evidence and the testi-

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- many of other witnesses that none of the claims was located according to the requirements of the mining laws and that no discovery was made thereon..... 324
6. Evidence tendered on appeal in a mining contest may not be considered except for the limited purpose of deciding whether a further hearing is warranted, since the record made at the hearing must be the sole basis for decision..... 325
7. A contractor under a contract for the construction of a road has not sustained its burden of proof where the only evidence offered by it in support of a particular claim is the testimony of one witness who repeated the allegations contained in the contractor's original claim letter, as such assertions have no probative weight in the absence of further amplification and documentation..... 345
8. The Board of Land Appeals has authority to reverse the findings of an Administrative Law Judge. However, where the resolution of a case depends primarily upon the Judge's findings of credibility, which in turn are based upon his reaction to the demeanor of witnesses, his findings will not be lightly set aside... 409
9. Although the Board of Land Appeals takes official notice of the findings and conclusions in an inter-

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- locutory order of the Indian Claims Commission on the claim of the Navajo Tribe of Indians against the United States, the Board's decision on a protest by the Tribe against issuance of a confirmatory patent to the State of Utah for school land sections now included within the boundaries of the Tribe's reservation is based solely upon the evidence in the hearing in the Department on this protest and upon its own application of the law to the facts in this case..... 441
10. Exhibits and oral testimony in an administrative hearing are not fungibles where evidentiary value is ascribed on a quantum basis. Instead, they are products having different probative values dependent upon factors such as relevance, competency and credibility..... 442
11. Where a prima facie case rests upon the establishment of a negative fact, but the other party has peculiar knowledge or control of the evidence as to such matter, the burden rests upon him to produce such evidence of sufficient weight and credibility, and failing, the negative will be presumed to have been established. This principle applies in a mining claim contest to the extent that where the Government has made a prima facie case of nonmarket-

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ability, and the contestee only testifies that he made sales but fails to buttress that testimony with specific data as to the sales or provide corroborating evidence thereof, he will be deemed to have failed in his burden of proof-----

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12. Under the Administrative Procedure Act, hearsay evidence is admissible at a hearing if it is relevant, material and not unduly repetitious, but it has little or no weight where the circumstances do not establish its reliability--

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GOVERNMENT CONTESTS

1. When a mining claimant has failed to answer a complaint in a mining contest, the allegations are deemed admitted under 43 CFR 4.450-7 and the Manager will decide the case without a hearing-----

324

2. When, pursuant to 43 CFR 4.450-7, a Manager has decided a mining contest against a defaulting contestee and no timely appeal was taken therefrom, a late appeal will be dismissed under 43 CFR 4.411(b)-----

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3. A defaulting contestee cannot rely on an answer filed by a co-claimant when such answer never purported to be on the defaulting contestee's behalf-----

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4. A mining claimant is not denied due process merely because of prehearing publicity where he fails

RULES OF PRACTICE—Con**GOVERNMENT CONTESTS—Con.**

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to show that there was any unfairness in the contest proceeding itself.

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5. Where a prima facie case rests upon the establishment of a negative fact, but the other party has peculiar knowledge or control of the evidence as to such matter, the burden rests upon him to produce such evidence of sufficient weight and credibility, and failing, the negative will be presumed to have been established. This principle applies in a mining claim contest to the extent that where the Government has made a prima facie case of non-marketability, and the contestee only testifies that he made sales but fails to buttress that testimony with special data as to the sales or provide corroborating evidence thereof, he will be deemed to have failed in his burden of proof-----

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HEARINGS

1. In connection with Government cancellation of a timber sale contract, a request for a hearing will be denied where no facts are alleged which, if proved, would warrant granting the relief sought.
2. An Administrative Law Judge is not disqualified nor will his findings be set aside in a mining contest because of a mere charge of bias in the absence of a substantial showing of bias.
3. Where an Administrative Law Judge's decision contains a ruling, in a single sen-

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- tence, on all of the proposed findings and conclusions submitted by a party to a hearing and the ruling on each finding and conclusion is clear, there is no requirement that the Judge rule separately as to each of the proposed findings and conclusions----- 325
4. Evidence tendered on appeal in a mining contest may not be considered except for the limited purpose of deciding whether a further hearing is warranted, since the record made at the hearing must be the sole basis for decision----- 325
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6. Where a prima facie case rests upon the establishment of a negative fact, but the other party has peculiar knowledge or control of the evidence as to such matter, the burden rests upon him to produce such evidence of sufficient weight and credibility, and failing, the negative will be presumed to have been established. This principle applies in a mining claim contest to the extent that where the Government has made a prima facie case of non-marketability, and the contestee only testifies that he made sales but

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- fails to buttress that testimony with specific data as to the sales or provide corroborating evidence thereof, he will be deemed to have failed in his burden of proof----- 572
7. A coal prospecting permittee who applies for a coal lease, alleging with supportive data that there is coal in commercial quantities within certain lands in his permit, is entitled to a hearing conducted in accordance with the Administrative Procedure Act, 5 U.S.C. § 554 (1970), before his application may be rejected because he has not shown coal in commercial quantities----- 624
8. An applicant for a section 15 grazing lease has no statutory or regulatory right to a full evidentiary hearing before an administrative law judge; a hearing on issues of fact may be ordered by this Board in its discretion, but a hearing will not be ordered where the applicant does not allege the existence of facts which, if proved, would entitle her to the relief sought----- 698

PRIVATE CONTESTS

1. The Navajo Tribe of Indians has standing within the Department of the Interior to contest or protest against the issuance of a confirmatory patent to the State of Utah for school sections within the exterior boundary of the reservation for the Tribe-

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| 1. A contractor's application to take depositions of retired Bureau employees and of a newspaper reporter will be denied, since such prospective witnesses are not under the control of the Government and the Board has no jurisdiction over third parties----- | 299 |
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SCHOOL LANDS**GENERALLY**

- Where the Secretary of the Interior is required by the Act of June 21, 1934, upon application by a state, to issue a patent to the state for school lands and to show the date title vested and the extent to which the lands are subject to prior con-

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| ditions, limitations, easements, or rights, if any, he (and his delegates) may determine questions of law as well as fact, including a determination as to whether title passed under the school land grant----- | 441 |
| 2. Although the Board of Land Appeals takes official notice of the findings and conclusions in an interlocutory order of the Indian Claims Commission on the claim of the Navajo Tribe of Indians against the United States, the Board's decision on a protest by the Tribe against issuance of a confirmatory patent to the State of Utah for school land sections now included within the boundaries of the Tribe's reservation is based solely upon the evidence in the hearing in the Department on this protest and upon its own application of the law to the facts in this case----- | 441 |
| 3. The Navajo Tribe of Indians has standing within the Department of the Interior to contest or protest against the issuance of a confirmatory patent to the State of Utah for school sections within the exterior boundary of the reservation for the Tribe----- | 442 |
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prevent the operation of the grant of lands for school purposes to the State, the intent of Congress must be ascertained by reading the provisions of the grant and the disclaimer of lands "owned or held by any Indian or Indian tribes" together, by considering the usual meaning of the words, by determining the overall purpose of the Act, and by considering the provisions in accordance with the historical milieu and public policy of that time, as well as any court interpretations of other statutes-----

442

5. Although the school land grant to the State of Utah was subject to existing inchoate settlement claims, including any by individual Indians outside their reservation, if the claims were not perfected, the State's title to the lands vested-----

443

6. The Acts of March 1, 1933, adding "vacant, unreserved, and undisposed of" public lands to the Navajo reservation, and of September 2, 1958, declaring lands within the exterior boundaries of the Navajo reservation in trust for the Navajo Tribe, "subject to valid existing rights," did not affect the existing title of the State of Utah in school sections which had vested in the State in 1900 when surveys were approved including the sections-----

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7. By the Utah Enabling Act of 1894, Congress did not intend the grant of school lands to the State of Utah, effective upon survey in 1900, to be held in abeyance as to unreserved public lands which may have been within a wide, undefined perimeter of use by a proportionately few Navajo families outside their reservation grazing flocks of sheep with transitory encampments in an area also used by non-Indians for grazing purposes and wandered over by Indians from other tribes-----

444

8. Where lands were not withdrawn for Indians, any express or implied consent by Indian Office officials to Navajos grazing sheep on public lands outside their reservation boundaries where no claim to the land was made under section 4 of the General Allotment Act and the lands were recognized by such officials and other government officials as public lands, rather than Indian lands, could not create Indian tribal occupancy rights to such lands superior to the Congressional grant to the State of Utah for school lands, and the State took an unencumbered fee simple title to such sections----

444

GRANTS OF LAND

1. Title to school sections granted to the State of Utah by section 6 of the Utah Enabling Act,

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28 Stat. 109, vests in the State on the date of Statehood (January 4, 1896), or upon completion and acceptance of the survey of the sections if the lands were not then surveyed.----- 441

2. Where Indian aboriginal rights are terminated by abandonment or relinquishment by a treaty with the United States, a state may take a grant of lands unencumbered by any occupancy claims in the Indians, and where the state's title has vested, subsequent action by Congress setting the lands apart as a reservation for the Indians cannot affect the state's title. However, if a reservation has been created prior to the grant, the state's title cannot vest until the reservation is extinguished.----- 443

INDEMNITY SELECTIONS

1. A resurvey of either the base lands or the lands selected by a State will have no effect upon the State's right to further lieu selection.----- 1

PARTICULAR STATES

1. To determine whether any Indian occupancy by Navajos outside their recognized reservation boundaries was recognized by the Utah Enabling Act of 1894 so as to prevent the operation of the grant of lands for school purposes to the State, the intent of Congress must be ascertained

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by reading the provisions of the grant and the disclaimer of lands "owned or held by any Indian or Indian tribes" together, by considering the usual meaning of the words, by determining the overall purpose of the Act, and by considering the provisions in accordance with the historical milieu and public policy of that time, as well as any court interpretations of other statutes.----- 442

2. The Acts of March 1, 1933, adding "vacant, unreserved, and undisposed of" public lands to the Navajo reservation, and of September 2, 1958, declaring lands within the exterior boundaries of the Navajo reservation in trust for the Navajo Tribe, "subject to valid existing rights," did not affect the existing title of the State of Utah in school sections which had vested in the State in 1900 when surveys were approved including the sections.----- 444
3. By the Utah Enabling Act of 1894, Congress did not intend the grant of school lands to the State of Utah, effective upon survey in 1900, to be held in abeyance as to unreserved public lands which may have been within a wide, undefined perimeter of use by a proportionately few Navajo families outside their reservation grazing flocks of sheep with transitory encamp-

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ments in an area also
used by non-Indians for
grazing purposes and
wandered over by Indians
from other tribes-----

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SCRIP

GENERALLY

1. A release filed by a land-grant railroad pursuant to section 321(b) of the Transportation Act of 1940, 54 Stat. 954, extinguishes the right of the railroad or its attorneys-in-fact to select lands or receive compensation in lieu of lands originally acquired by it under the Act of July 27, 1866, in aid of construction of the railroad but relinquished under the Act of June 4, 1897-----

302

PAYMENT IN SATISFACTION

1. Where a railroad's forest lieu selection rights are extinguished by a release given to the United States, the rights (if any) of a purchaser of the selection rights from the railroad are also extinguished----

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SECRETARY OF THE INTERIOR.

1. "Delegation." The use of the term "delegation" in *Solicitor's Opinion*, M-36803 (Apr. 3, 1970), 77 I.D. 50, interpreting 25 U.S.C. § 48 allowing Indian tribes to " * * * be given * * *" direction over Federal employees, does not add substances to the argument that the statute is an unconstitutional delegation of authority prohibited by *Schechter Poultry v. United States*, 295 U.S. 495 (1935)-----

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2. The Secretary of the Interior has the authority and the duty to determine what lands are public lands of the United States, including the authority to determine navigability of a lake to ascertain whether title to the land underlying the lake remains in the United States or whether title passed to a State upon its admission into the Union

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3. Where the Secretary of the Interior is required by the Act of June 21, 1934, upon application by a state, to issue a patent to the state for school lands and to show the date title vested and the extent to which the lands are subject to prior conditions, limitations, easements, or rights, if any, he (and his delegates) may determine questions of law as well as fact, including a determination as to whether title passed under the school land grant.

441

SETTLEMENTS ON PUBLIC LANDS

1. A homestead settlement claim for an additional homestead entry under the Act of April 28, 1904 (33 Stat. 527), 43 U.S.C. § 213, may be made for unsurveyed lands in Alaska by a person otherwise qualified who has filed an application for homestead entry on a form approved by the Director, Bureau of Land Management, and made acceptable final proof on his original homestead settlement claim, where

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STATE GRANTS

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the combined area of the two claims does not exceed 160 acres.....	269	1. Where the Secretary of the Interior is required by the Act of June 21, 1934, upon application by a state, to issue a patent to the state for school lands and to show the date title vested and the extent to which the lands are subject to prior conditions, limitations, easements, or rights, if any, he (and his delegates) may determine questions of law as well as fact, including a determination as to whether title passed under the school land grant.....	441
2. From the latter part of the 19th century to the Taylor Grazing Act of June 28, 1934, there was a general policy of the Federal Government to permit acquisition of title to open, unreserved public lands by individuals settling upon the land, including Indians, but vested rights were obtained to the lands only upon compliance with a specific act of Congress, and only for the maximum acreage allowable under that law.....	442	2. Title to school sections granted to the State of Utah by section 6 of the Utah Enabling Act, 28 Stat. 109, vests in the State on the date of Statehood (January 4, 1896), or upon completion and acceptance of the survey of the sections if the lands were not then surveyed.....	441
3. Although the school land grant to the State of Utah was subject to existing inchoate settlement claims, including any by individual Indians outside their reservation, if the claims were not perfected, the State's title to the lands vested...	443	3. To determine whether any Indian occupancy by Navajos outside their recognized reservation boundaries was recognized by the Utah Enabling Act of 1894 so as to prevent the operation of the grant of lands for school purposes to the State, the intent of Congress must be ascertained by reading the provisions of the grant and the disclaimer of lands "owned or held by any Indian or Indian tribes"	
4. The Indian Homestead Acts and section 4 of the General Allotment Act are settlement acts within the framework of other settlement laws pertaining to the public lands, and the practice, rules and decisions regarding white settlers on the public lands have been applied to them with certain reasonable modifications taking into account Indian habits, character, and disposition....	443		

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together, by considering the usual meaning of the words, by determining the overall purpose of the Act, and by considering the provisions in accordance with the historical milieu and public policy of that time, as well as any court interpretations of other statutes.....

442

4. Where Indian aboriginal rights are terminated by abandonment or relinquishment by a treaty with the United States, a state may take a grant of lands unencumbered by any occupancy claims in the Indians, and where the state's title has vested, subsequent action by Congress setting the lands apart as a reservation for the Indians cannot affect the state's title. However, if a reservation has been created prior to the grant, the state's title cannot vest until the reservation is extinguished.....

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STATUTORY CONSTRUCTION

GENERALLY

1. There is a well-established rule of statutory construction to favor Indians in case of doubt as to the meaning of words in treaties or legislation in their behalf; however, the rule is not inflexible in its application and must give way where such action is warranted by other rules of construction and the circumstances of the case.....

442

2. To determine whether any Indian occupancy by

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Navajos outside their recognized reservation boundaries was recognized by the Utah Enabling Act of 1894 so as to prevent the operation of the grant of lands for school purposes to the State, the intent of Congress must be ascertained by reading the provisions of the grant and the disclaimer of lands "owned or held by any Indian or Indian tribes" together, by considering the usual meaning of the words, by determining the overall purpose of the Act, and by considering the provisions in accordance with the historical milieu and public policy of that time, as well as any court interpretations of other statutes.....

443

3. The word "held" as used in statutes in relation to land often means "owned," but as there is no fixed primary or technical meaning, its meaning must be determined by the context in which it is used to ascertain the legislative intent.....

443

4. Historical differences between the situation in Alaska and the other states afford reasons for different interpretations of legislation pertaining to Alaska natives and legislation pertaining to Indians in the other states. Therefore section 8 of the Act of May 17, 1884, regarding the occupancy of Alaska natives and others

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upon public land, is not *in pari materia* with the disclaimer provision in section 3 of the Utah Enabling Act of 1894, as to lands "owned or held by any Indian or Indian Tribes"-----

443

5. The Indian Homestead Acts and section 4 of the General Allotment Act are settlement acts within the framework of other settlement laws pertaining to the public lands, and the practice, rules and decisions regarding white settlers on the public lands have been applied to them with certain reasonable modifications taking into account Indian habits, character, and disposition-----

443

6. By the Utah Enabling Act of 1894, Congress did not intend the grant of school lands to the State of Utah, effective upon survey in 1900, to be held in abeyance as to unreserved public lands which may have been within a wide, undefined perimeter of use by a proportionately few Navajo families outside their reservation grazing flocks of sheep with transitory encampments in an area also used by non-Indians for grazing purposes and wandered over by Indians from other tribes-----

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SURFACE RESOURCES ACT

GENERALLY

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1. In a proceeding under section 5 of the Surface Resources Act of July 23, 1955, to determine whether a mining claim is subject to the limitations and restrictions of section 4 of the Act, the issue is whether or not there is now disclosed within the boundaries of each claim valuable minerals of sufficient quantity, quality, and worth to constitute a discovery, and whether the discovery was made prior to the effective date of the Act-----

792

2. Testimony by a government mineral engineer that he examined the mining claims and the workings thereon and sampled the areas recommended by the claimant but found no evidence of a valuable mineral deposit which would have in the past or present justified a person of ordinary prudence in the further expenditure of his time and means an effort to develop a valuable mine, is sufficient to establish a prima facie case of absence of a discovery so as to subject a mining claim to the limitations imposed by section 4 of the Act of July 23, 1955-----

792

HEARINGS

1. A hearing under section 5 of the Surface Resources Act of July 23, 1955, directed only to a portion

SURFACE RESOURCES ACT—Con.
HEARING—Con.

of a claim is insufficient to establish an absence of a discovery as to the whole claim as the locator may still have a valuable mineral deposit on that portion of the claim not challenged by the Government.

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VERIFIED STATEMENT

1. Where a verified statement filed pursuant to the Surface Resources Act of July 23, 1955, fails to set forth, as required by section 5(a)(3) of the Act, all of the sections of public land which are embraced within each of the claimant's mining claims, the statement is defective as to an inadequately described claim and said claim is subject to the limitations and restrictions of the Act.-----

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TAYLOR GRAZING ACT

GENERALLY

1. Prior to the Taylor Grazing Act of June 28, 1934, generally open, unreserved public lands could be grazed upon without federal governmental interference or regulation, but subject to certain state laws-----
2. From the latter part of the 19th century to the Taylor Grazing Act of June 28, 1934, there was a general policy of the federal government to permit acquisition of title to open, unreserved public lands by individuals

442

2. From the latter part of the 19th century to the Taylor Grazing Act of June 28, 1934, there was a general policy of the federal government to permit acquisition of title to open, unreserved public lands by individuals

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GENERALLY—Con.

setting upon the land, including Indians, but vested rights were obtained to the lands only upon compliance with a specific act of Congress, and only for the maximum acreage allowable under that law-----

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TIMBER SALES AND DISPOSALS

1. Upon request of the State Director, a District Manager, Bureau of Land Management, who has authority to enter into timber sale contracts also has authority to terminate such contracts when to do so would be in the best interest of the Government.-----
2. Section 1 of the Act of July 31, 1947, *as amended*, 30 U.S.C. § 601 (1970) gives the Secretary the power to dispose of timber on the public lands if to do so would not be detrimental to the public interest.-----
3. In accordance with guidelines provided by the Council on Environmental Quality, 36 F.R. 7724, detailed environmental statements are not required under section 102-(2) (C) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4331(2) (C) (1970), in connection with the cancellation of a timber sale contract where it is not reasonable to anticipate a cumulatively significant adverse effect on the environment.-----

202

2. Section 1 of the Act of July 31, 1947, *as amended*, 30 U.S.C. § 601 (1970) gives the Secretary the power to dispose of timber on the public lands if to do so would not be detrimental to the public interest-----

203

3. In accordance with guidelines provided by the Council on Environmental Quality, 36 F.R. 7724, detailed environmental statements are not required under section 102-(2) (C) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4331(2) (C) (1970), in connection with the cancellation of a timber sale contract where it is not reasonable to anticipate a cumulatively significant adverse effect on the environment.

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TITLE

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1. The Secretary of the Interior has the authority and the duty to determine what lands are public lands of the United States, including the authority to determine navigability of a lake to ascertain whether title to the land underlying the lake remains in the United States or whether title passed to a State upon its admission into the Union-----

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UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT OF 1970

UNIFORM RELOCATION ASSISTANCE

Moving and Related Expenses

Moving Expense Allowance

1. Where qualified persons displaced from their dwelling elect to receive a moving expense allowance under subsection 202 (b) of the Act, the payment is properly based on the schedule established for such purpose by the Bureau head in accordance with moving allowance schedules maintained by the State highway department of the State in which the displacement occurs-----

719

Payment for Moving Expenses Generally

1. A claimed loss in appraised value of a dwelling property which serves as the headquarters for a farm operation, and the expense incurred in obtaining the appraisal, being unrelated to the trans-

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT OF 1970—Con.

UNIFORM RELOCATION ASSISTANCE—Con.

Moving and Related Expenses—Con.

Payment for Moving Expenses—Con. Generally—Con.

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action in which the United States acquired one of two disconnected tracts comprising the farm operation, one of which was situated approximately 8 miles north of the dwelling site property and the other approximately 5¼ miles southwest of it, are properly disallowed as not compensable-----

554

Payments in Lieu of Moving and Related Expenses Fixed Payment

Partial Taking of Farm Operation

1. A claim for a fixed payment in lieu of actual moving and related expenses is properly disallowed in the case of a partial acquisition of a farm operation where the farm met the definition of a farm operation prior to the acquisition and the property remaining after the acquisition also meets that definition-----

554

Taking of Farm Operation

1. In computing average annual net earnings of a farm operation for purposes of determining the amount of the fixed relocation payment to which the claimants are entitled under subsection 202(c) of the Act, by reason of displacement from their farm operation, the utilization by the Bureau

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT OF 1970—Con.

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Moving and Related Expenses—Con.

Payments in Lieu of Moving and Related Expenses—Con.

Fixed Payment—Con.

Taking of Farm Operation—Con.

of a four-year period which is more equitable for establishing such earnings than the two-year period which would otherwise be applicable, will be upheld as a reasonable exercise of the discretionary authority delegated to the Bureau for such purpose under pertinent Departmental regulation

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2. In computing average annual net earnings of a farm operation for purposes of determining the amount of the fixed relocation payment to which the claimants are entitled under subsection 202(c) of the Act, charges for use of the lands on a rental basis may not be deducted from net earnings which are reported and recognized for income tax purposes of the owner of the farm operation

719

Replacement Housing Payment for Homeowners

1. Where it appears that the replacement housing payment authorized by the Bureau under subsection 203(a)(1)(A) of the Act represents an amount

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT OF 1970—Con.

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Replacement Housing Payment for Homeowners—Con.

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which, when added to the acquisition cost of the dwelling acquired, meets the reasonable cost of the comparable replacement dwelling which is decent, safe and sanitary, and adequate to accommodate the displaced persons, the Bureau determination will be affirmed. In determining such amount, it is proper to add to the total appraisal of the acquired dwelling, the proportionate amount of the total acquisition costs in excess of appraised valuation of the acquired property which is allocable to the acquisition cost of the acquired dwelling

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WITHDRAWALS AND RESERVATIONS

GENERALLY

1. Where land has been withdrawn for state management as a wildlife area under the Fish and Wildlife Coordination Act, the Bureau of Land Management must consider the recommendations of the state and of the Bureau of Sport Fisheries and Wildlife to assure conservation of the fish and wildlife before approving a right-of-way application under the Act of March 3, 1891, for a pumping site and irrigation system

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EFFECT OF

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1. Where Indian aboriginal rights are terminated by abandonment or relinquishment by a treaty with the United States, a state may take a grant of lands unencumbered by any occupancy claims in the Indians, and where the State's title has vested, subsequent action by Congress setting the lands apart as a reservation for the Indians cannot affect the state's title. However, if a reservation has been created prior to the grant, the state's title cannot vest until the reservation is extinguished..... 443
2. Where land included in a homestead entry is described among lands withdrawn subject to valid existing rights, the withdrawal attaches to the land upon cancellation of the homestead entry..... 811
3. Public lands which are withdrawn from all forms of appropriation under the public land laws, except location for metalliferous minerals under the mining laws, are not subject to entry under the homestead laws..... 811

WORDS AND PHRASES

1. "Two Consecutive years." The term "two consecutive years" in 43 CFR 4115.2-1(e)(9)(i) means two consecutive application years and not two growing seasons..... 18

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2. "Grantor." The word "grantor" as used in the Color of Title Act, 45 Stat. 1069 (1928), as amended, 43 U.S.C. § 1068 (1970), means a person by whom a grant is made, grant being a generic term applicable under the statute to all transfers of real property, including devises and transfers by operation of law..... 209
3. "Delegation." The use of the term "delegation" in *Solicitor's Opinion*, M-36803 (Apr. 3, 1970), 77 I.D. 50, interpreting 25 U.S.C. § 48 allowing Indian tribes to " * * * be given * * * " direction over Federal employees, does not add substances to the argument that the statute is an unconstitutional delegation of authority prohibited by *Schechter Poultry v. United States*, 295 U.S. 495 (1935)..... 218
4. "Held." The word "held" as used in statutes in relation to land often means "owned," but as there is no fixed primary or technical meaning, its meaning must be determined by the context in which it is used to ascertain the legislative intent..... 443
5. "Public Land." The term "public land," as used in the Color of Title Act, 43 U.S.C. § 1068 (1970), does not include land purchased by the Government. That term does not include land which has been set aside by Executive Order for the benefit of the Indians... 702